Diversity in a Different Dimension: Evolutionary Theory and Affirmative Action's Destiny*

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Bakke *is banal, and the affirmative action debate is dishonest. Two decades of doctrinal deadlock have shed little or not light on "diversity," the only viable justification for race-conscious university admissions. We can break the logjam by entertaining a series of elaborate legal analogies. The law seeks to protect diversity in many domains, including politics, free expression, agriculture, and the environment. The diversity at stake in race-based educational affirmative action seems minimal when compared with other sorts of diversity, especially the precarious biological diversity shielded by the Endangered Species Act of 1973. Extinction is forever; affirmative action should not be.* Bakke *has failed on its own terms, and its eclipse in California and Texas offers American higher education an opportunity to experiment with innovative alternatives.*

I. THE UNBEARABLE BANALITY OF *BAKKE*

[I]t will become a solid mass, permanently protuberant, its inanity irreparable
—Milan Kundera[1]

A. *Perpetual Czech*

Bakke[2] is banal. Two decades after the Supreme Court decided its lone case on the subject, the debate over educational affirmative action has exhausted all available arguments. For this state of affairs, the judiciary bears no blame. "[T]he Supreme Court has said a lot about contracting and rather little about

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* *Cf.* (loosely) CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1982).

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[1] MILAN KUNDERA, THE UNBEARABLE LIGHTNESS OF BEING 4 (Michael Henry Heim trans., 1984).

[2] Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

education."[3] In its lone case on affirmative action in schoolteacher hiring, the Court burned a rare grant of certiorari merely to crush a fatuous "role model" theory.[4] Other affirmative action blockbusters have evaporated from the Court's calendar.[5]

Never fear. Hordes of legal commentators have invaded the niche left vacant by the Justices. Volume, however, should not be confused with quality. Daniel Farber's two-paragraph survey of American scholarship on affirmative action remains as comprehensive today as it was in 1994.[6]

If only Herman Schwartz had correctly predicted in 1987 that it really was all over but the shouting.[7] Alas, we are "doomed to hear" the opposing arguments "repeatedly in the future."[8] "Against boredom even gods struggle in vain."[9] "Damn!! Damn!! Damn!! Damn!!"[10]

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[3] Akhil Reed Amar & Neal Kumar Katyal, Bakke*'s Fate*, 43 UCLA L. REV. 1745, 1746 (1996); *see also* Wessmann v. Boston Sch. Comm., 996 F. Supp. 120, 130 (D. Mass. 1998) (distinguishing between "regulations awarding . . . construction contracts" on one hand and "the authority of a school committee to make student assignments on the combined criteria of academic achievement and racial/ethnic sensitivity" on the other hand).

[4] *See* Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986).

[5] *See* Piscataway Bd. of Educ. v. Taxman, 118 S. Ct. 595 (1997), *vacating as moot* 91 F.3d 1547 (3d Cir. 1996); Texas v. Hopwood, 518 U.S. 1033, *denying cert. to* 78 F.3d 932 (5th Cir. 1996); DeFunis v. Odegaard, 416 U.S. 312, 318–20 (1974), *vacating as moot* 507 P.2d 1169 (Wash. 1973).

[6] *See* Daniel A. Farber, *Missing the "Play of Intelligence,"* 36 WM. & MARY L. REV. 147, 159 (1994). To wit, the pro-affirmative action argument:

> Color-blindness sounds good in theory but ignores social reality. Given a history going back to slavery, and the prevalence, even today, of conscious and unconscious discrimination, affirmative action is a necessity. It also ensures that the full diversity of viewpoints in our multicultural society is represented.

Id. (emphasis omitted). And herewith the argument against:

> Whether you call them affirmative action or reverse discrimination, racial preferences are wrong. They are morally wrong whichever group is favored. They are also dangerous, because they reinforce the legitimacy of racial thinking and racial stereotypes. Race is simply an irrelevant personal characteristic.

Id. (emphasis omitted).

[7] *See* Herman Schwartz, *The 1986 and 1987 Affirmative Action Cases: It's All Over but the Shouting*, 86 MICH. L. REV. 524 (1987).

[8] Farber, *supra* note 6, at 160.

[9] FRIEDRICH NIETZSCHE, *The Antichrist* § 48, *in* TWILIGHT OF THE IDOLS AND THE ANTICHRIST 113, 164 (R.J. Hollingdale trans., 1968) (1895).

[10] ALAN JAY LERNER, MY FAIR LADY, act 2, sc. 2 (1956); *cf.* Jim Chen, *Diversity and*

Well, then. Affirmative action. There may not be a more overwritten subject in American law.[11] After two decades of repetitive scholarship, there should be no more surprises—except perhaps the bottomless capacity of the legal academy not to tire of the subject. Surely we can agree on this much:

1. *Bakke* lives. In 1996 a renegade Fifth Circuit panel disagreed,[12] but so what? The Supreme Court alone enjoys "the prerogative of overruling its own decisions,"[13] and so far it has not hammered *Bakke*.[14] Predictions that the Court would eventually do so remain just that—educated guesses.[15]

2. *Metro Broadcasting, Inc. v. FCC*,[16] though largely abrogated, did recognize diversity in broadcast television and radio as at least an "important" governmental interest for equal protection purposes.[17]

3. *Adarand Constructors, Inc. v. Pena*[18] applied strict scrutiny to all racial

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Damnation, 43 UCLA L. REV. 1839, 1839–45, 1900–10 (1996) (examining affirmative action through a damnation metaphor).

[11] That quickest and dirtiest of empirical surveys of legal literature, the Westlaw search, revealed that as of July 11, 1998, the JLR library in the West Group's electronic database included 462 articles containing "affirmative action" in their titles. By contrast, 586 articles contained the word "federalism." Neither search is especially scientific, but there is no small significance in the suggestion that there are four-fifths as many articles on affirmative action as there are articles on the oldest and arguably most important question in American constitutional law. *See* New York v. United States, 505 U.S. 144, 149 (1992); H. Jefferson Powell, *The Oldest Question of Constitutional Law*, 79 VA. L. REV. 633 (1993).

[12] *See* Hopwood v. Texas, 78 F.3d 932, 944 (5th Cir.), *cert. denied*, 518 U.S. 1933 (1996).

[13] Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 484 (1989); *accord* American Trucking Ass'ns v. Smith, 496 U.S. 167, 180 (1990) (plurality opinion); Hopwood v. Texas, 84 F.3d 720, 722 (5th Cir. 1996) (Politz, C.J., dissenting from denial of rehearing en banc).

[14] *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 257–58 (1995) (Stevens, J., dissenting) (arguing that *Adarand* did not "diminish" that aspect of *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990), which established "[t]he proposition that fostering diversity may provide a sufficient interest to justify" a racial classification); *cf.* Texas v. Hopwood, 518 U.S. 1033, 1033–34 (1996) (opinion of Souter and Ginsburg, JJ., respecting the denial of certiorari) (arguing that the petition for certiorari in *Hopwood* had not properly presented the issue of "[w]hether it is constitutional for a public college or graduate school to use race or national origin as a factor in its admissions process").

[15] *See, e.g.*, Richard D. Kahlenberg, *Class-Based Affirmative Action*, 84 CAL. L. REV. 1037, 1043 (1996).

[16] 497 U.S. 547 (1990).

[17] *See id.* at 566; *cf.* Lutheran Church-Mo. Synod v. FCC, 141 F.3d 344, 354 (D.C. Cir. 1998) (noting that *Metro Broadcasting* "held only that the diversity interest was 'important'" and refusing to elevate "diversity . . . to the 'compelling' level").

[18] 515 U.S. 200 (1995).

> classifications, no matter what the level of government or the putatively benign nature of the official action in question.[19]

The cases leave two serious doctrinal questions. First, is educational diversity a sufficiently compelling governmental interest to justify resort to that most lethal of legal tools, the racial classification? Second, even if educational diversity is sufficiently compelling, under what circumstances, if any, can a racial classification be narrowly tailored to achieve that interest?

Such doctrinal issues should have been resolved long ago. At the very least, its contestants should have realized how quickly they would reach argumentative deadlock. *Bakke* provided an entire generation of educators with guidance[20] so explicit that Justice Powell's opinion can be regarded as "the Kama Sutra of educational affirmative action."[21] Repetition of its own force should have bored the academy into submission, for "everything gets old if you do it often enough."[22] Even staid old Calvin Coolidge understood the true essence of diversity: greater variety brings greater happiness.[23] The commentators could have left the problem's final resolution to an eminently foreseeable lawsuit brought by a disgruntled college or graduate school applicant. But no. Even though "[p]rofessors are the last class of individuals who can be trusted to deliver dispassionate, well-deliberated views" on this subject,[24] law professors persist in writing about affirmative action in law school settings.[25]

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[19] *See id.* at 227 (overruling *Metro Broadcasting* insofar as that decision prescribed intermediate scrutiny of "benign" racial classifications adopted by Congress); *cf.* Neil Devins, Metro Broadcasting, Inc. v. FCC: *Requiem for a Heavyweight*, 69 TEX. L. REV. 125, 128 (1990) (observing—accurately in hindsight—that *Metro Broadcasting* was the most doctrinally vulnerable of the Supreme Court's affirmative action decisions).

[20] *See* Amar & Katyal, *supra* note 3, at 1769; Kenneth L. Karst & Harold W. Horowitz, *The* Bakke *Opinions and Equal Protection Doctrine*, 14 HARV. C.R.-C.L. L. REV. 7, 7 (1979).

[21] Jim Chen, *Embryonic Thoughts on Racial Identity as New Property*, 68 U. COLO. L. REV. 1123, 1127 (1997).

[22] THE LAST PICTURE SHOW (Last Picture Show Productions, Inc., 1971).

[23] *See* MARTIN DALY & MARGO WILSON, SEX, EVOLUTION, AND BEHAVIOR 79 (2d ed. 1983) (describing the famous "Coolidge effect" in evolutionary biology); MATT RIDLEY, THE RED QUEEN: SEX AND THE EVOLUTION OF HUMAN NATURE 299 (1993) (same).

[24] Chen, *supra* note 10, at 1867; *cf.* R.H. Coase, *The Market for Goods and the Market for Ideas*, 64 AM. ECON. REV. 384 (1974) (explaining how educators' self-interest undermines the credibility of their opinions on educational policy), *reprinted in* R.H. COASE, ESSAYS ON ECONOMICS AND ECONOMISTS 64 (1994); E.G. West, *The Political Economy of American Public School Legislation*, 10 J.L. & ECON. 101 (1967) (same).

[25] *See* Daniel A. Farber, *The Outmoded Debate over Affirmative Action*, 82 CAL. L.

The question remains. Why has the affirmative action debate endured so long and on such dreary terms? Perhaps the answer lies in the sweet, soporific nature of the word *diversity*. Consider this pair of observations from California, the most prominent jurisdiction to have terminated affirmative action by democratic means. UCLA professor Eugene Volokh noted that "[d]iversity is particularly appealing because of what it is not."[26] It avoids all the hard issues that burden other racially tinged legal questions: racial responsibility, group rights, proportional racial representation, compensatory justice, innocent victims, or "even . . . a social consensus about the magnitude of present discrimination."[27] Judge Alex Kozinski of the Ninth Circuit took the matter an extra step, remarking that "everyone likes diversity, so long as it falls within a fairly narrow ideological range."[28]

Occasionally a wise voice from the bench or beyond indicates that we are not so easily bamboozled. "[F]acial diversity is not true diversity," said the lone Fifth Circuit judge in *Hopwood v. Texas*[29] who declined to vote to overrule *Bakke*.[30]

On balance, though, Americans in general, and well-educated Americans in particular, regard "diversity" as a catch-all, feel-good term. Like most other American universities, the Ohio State University promises through its diversity policy to "[*c*]*elebrate* our uniqueness" by "[c]ultivat[ing] respect for and appreciation of personal and cultural differences among all members of the university community."[31] But the term is plastic enough to serve other ideological objectives. For years, lest our collective memory slip altogether, the federal judiciary explicitly permitted the Virginia Military Institute to exclude women in the name of educational "diversity."[32] She who lives by the

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REV. 893, 919 (1994) (noting that articles on affirmative action often "draw[ ] on examples within the law school context" because most of the writers "are law professors, and therefore most familiar with employment standards for lawyers and law professors").

[26] Eugene Volokh, *Diversity, Race as Proxy, and Religion as Proxy*, 43 UCLA L. REV. 2059, 2059 (1996).

[27] *Id.*

[28] Alex Kozinski, *Teetering on the High Wire*, 68 U. COLO. L. REV. 1217, 1229 (1997).

[29] 78 F.3d 932 (5th Cir. 1996).

[30] *Id.* at 966 (Wiener, J., specially concurring).

[31] The Division of Student Affairs at The Ohio State University (visited July 14, 1998) <http://www.osu.edu/units/stuaff/mission.htm> (emphasis added).

[32] *Compare* United States v. Virginia, 976 F.2d 890, 899 (4th Cir. 1992), *cert. denied*, 508 U.S. 946 (1993) (describing VMI's male-only admissions policy as motivated by "a desire for educational diversity") *with* United States v. Virginia, 518 U.S. 515, 539 (1996) (rejecting VMI's diversity claim and thereby ending VMI's sexually exclusionary reign). *See*

shibboleth shall die by sophistry and chicanery.

B. *D-Day for Diversity: The Second Front*

On so jovial an occasion as a twentieth anniversary, I shall not reformulate my previous attacks on *Bakke*. Elsewhere I have argued at length that the diversity rationale, as deployed to justify race-conscious admissions and hiring in higher education, violates not only equal protection but also the constitutional commitment to free speech[33] and the simplest principles of administrative consistency.[34] I have even had occasion to describe my own experiences on the ideological frontiers of the race-conscious legal academy.[35] Rather, I shall focus on a missed opportunity. Yes, a battle-weary legal world long ago might have resolved the affirmative action stalemate.[36]

Our obsessive gaze on *Bakke* has blinded us to the fact that the Supreme Court rendered a *second* diversity decision during October Term 1977. The Court that ordered Alan Bakke's admission to medical school also halted the construction of a $110 million dam that promised extinction for *Percina (Imostoma) tanasi*—the snail darter. I am speaking, of course, of *Tennessee Valley Authority v. Hill*.[37]

June 1978 was D-Day for diversity. On the 15th, Chief Justice Burger spoke for a six-Justice majority in *Hill*, over Justice Powell's objection.

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also Bennett L. Saferstein, Note, *Revisiting* Plessy *at the Virginia Military Institute: Reconciling Single-Sex Education with Equal Protection*, 54 U. PITT. L. REV. 637, 656 (1993) (describing the use of the term "diversity" in the VMI litigation as "a clever rhetorical device" designed to evoke "positive, politically correct connotations" of "a diverse student body or diverse academic offerings"); *cf.* Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 745 (1982) (Powell, J., dissenting) (defending state-sponsored, single-sex education as "preservation of" an American tradition of "respect for diversity").

[33] *See* Chen, *supra* note 10.

[34] *See id.* at 1883–94.

[35] *See* Jim Chen, *Unloving*, 80 IOWA L. REV. 145, 147–49 (1994) [hereinafter Chen, *Unloving*]; Jim Chen, *Untenured but Unrepentant*, 81 IOWA L. REV. 1609 (1996) [hereinafter Chen, *Untenured but Unrepentant*]. Indeed, there may be no better evidence of diversity's ideological insidiousness than the existence of law review colloquies designed to rebuke, perhaps even to ruin, those who dare to question the value of race-conscious legal scholarship. *See* Colloquy, *Responses to Randall Kennedy's* Racial Critiques of Legal Academia, 103 HARV. L. REV. 1844 (1990) (responding to Randall L. Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745 (1989)); Colloquy, *The Scholarship of Reconstruction and the Politics of Backlash*, 81 IOWA L. REV. 1467 (1996) (responding to Chen, *Unloving*, *supra*).

[36] *See generally* Nathan Glazer, *The Affirmative Action Stalemate*, 90 PUB. INTEREST 99 (1988).

[37] 437 U.S. 153 (1978).

Thirteen days later, Justice Powell wrote for himself in announcing *Bakke*. To my knowledge no scholar has ever compared the discussions of diversity in these two cases. To be sure, *Hill* did not mention "diversity," much less "biological diversity" or "biodiversity," but those two terms (rather remarkably) did not work their way into reported federal decisions until 1995.[38] Despite the superficial incongruity, it is obvious (with two decades' hindsight) that both *Hill* and *Bakke* hinged on diversity.

Hill posed a conflict between the Tellico Dam, a $110 million project on the Little Tennessee River,[39] and the snail darter, a "three-inch, tannish-colored," "previously unknown species of perch."[40] The proposed dam would disrupt the aeration of the river's depths, eliminate the fish's breeding opportunities, and exterminate snails, the darter's primary diet.[41] Scientists failed to find the fish elsewhere,[42] and there was no assurance that transplantation to other watercourses would succeed.[43] No one disputed that "the Tellico Dam [would] either eradicate the known population of snail darters or destroy their critical habitat."[44]

The fish won. The Court vigorously enforced the Endangered Species Act's command "that actions authorized, funded, or carried out by [federal agencies] do not jeopardize the continued existence [of an endangered species] or result in the destruction or modification of habitat of such species."[45] Chief Justice Burger held that Congress assigned "endangered species . . . the highest of priorities," well above even the dam's "anticipated benefits."[46] Noting the accelerating rate of extinctions attributable to human activity,[47] members of Congress "'uniformly deplored the irreplaceable loss to aesthetics, science,

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[38] *See* Sierra Club v. United States Forest Serv., 46 F.3d 835, 839 n.8 (8th Cir. 1995) (using the term "biodiversity"); Sierra Club v. Marita, 46 F.3d 606 *passim* (7th Cir. 1995) (using the term "biological diversity"). These two cases were decided 12 days apart in different courts of appeals and were reported in the same volume of *Federal Reporter, Third Series*.

[39] *See Hill*, 437 U.S. at 200 n.6 (Powell, J., dissenting) (documenting the amounts expended on the construction of the Tellico Dam); *cf. id.* at 172 (placing the figure at "more than $100 million").

[40] *Id.* at 158.

[41] *See id.* at 162, 165 n.16.

[42] *See id.* at 161 & n.12.

[43] *See id.* at 162–63 & n.13.

[44] *Id.* at 171.

[45] Endangered Species Act of 1973, Pub. L. No. 93-205, 81 Stat. 844 (codified at 16 U.S.C. § 1536 (1994)), *quoted in Hill*, 437 U.S. at 173 (emphasis omitted).

[46] *Hill*, 437 U.S. at 174.

[47] *See id.* at 176.

ecology, and the national heritage should more species disappear.'"[48] Legislators urged each other to staunch "'homogeniz[ation] [of] the habitats in which [endangered] plants and animals evolved,'" to "'minimize the losses of genetic variations.'"[49] This diversity—the concept was unmistakably present even though the Court never used the word—had, "'quite literally, [an] incalculable'" value.[50]

Bakke's celebration of educational, as opposed to ecological, diversity has become a constitutional cliché. Enveloping the Regents' diversity claim within the First Amendment cloak of "academic freedom,"[51] Justice Powell agreed "that the 'nation's future depends upon leaders trained through wide exposure' to the ideas and mores of students as diverse as this Nation of many peoples."[52] Like its ecological counterpart, educational diversity could not be quantified or reduced to a single moment; even without "'know[ing] how, and when, and even if, . . . informal 'learning through diversity' actually occurs,'" Justice Powell assumed it could take place through "'unplanned, casual encounters with roommates'" and other students.[53] Regardless of its origins and its mechanics, the diversity introduced by a student "with a particular . . . ethnic, geographic, culturally advantaged or disadvantaged" background would "enrich the training of [the] student body" at large "and better equip [all] graduates to render with understanding their vital service to humanity."[54] As did *Hill*, *Bakke* assigned a positive (albeit indefinite and unquantifiable) value to a certain sort of diversity—and was prepared to defend that diversity on utilitarian grounds.

Ironically, only two weeks before announcing *Bakke*, Justice Powell had dissented vigorously from the Court's celebration of ecological diversity in *Hill*. This dissent packed twice the persuasive power of the lead opinion in *Bakke*.[55]

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[48] *Id.* at 177 (quoting George Cameron Coggins, *Conserving Wildlife Resources: An Overview of the Endangered Species Act of 1973*, 51 N.D. L. REV. 315, 321 (1975)).

[49] *Id.* at 178 (quoting H.R. REP. No. 93-412, at 4–5 (1973)) (emphasis omitted).

[50] *Id.* (emphasis omitted).

[51] *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 312 (1978) (opinion of Powell, J.).

[52] *Id.* at 313 (quoting Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967)).

[53] *Id.* at 313 n.48 (quoting William G. Bowen, *Admissions and the Relevance of Race*, PRINCETON ALUMNI WKLY., Sept. 26, 1977, at 7, 9).

[54] *Id.* at 314.

[55] Justice Blackmun joined Justice Powell's *Hill* dissent. In *Bakke*, of course, Justice Powell stood famously alone. *See* Cass A. Sunstein, *Public Deliberation, Affirmative Action, and the Supreme Court*, 84 CAL. L. REV. 1179, 1185 (1996) (noting that Justice Powell spoke solely for himself and "that other eight participating Justices explicitly rejected" his view of the case).

Justice Powell took special pains to stress that "the snail darter is . . . hardly an extraordinary [species]."[56] Noting the difficulty faced by ichthyologists in "distinguishing it from several related species,"[57] he recited several numbers manifestly intended to minimize the snail darter's uniqueness and value:

> [N]ew species of darters are discovered in Tennessee at the rate of about 1 a year; 8 to 10 have been discovered in the last five years. All told, there are some 130 species of darters, 85 to 90 of which are found in Tennessee, 40 to 45 in the Tennessee River System, and 11 in the Little Tennessee itself.[58]

And to compound the insult he had hurled at the snail darter, Justice Powell heaved a rhetorical Parthian volley at putatively "lower" life forms. Surely it would be "absurd,"[59] he suggested, to destroy "even the most important federal project in our country [upon] a finding by the Secretary of the Interior that a continuation of the project would threaten the survival or critical habitat of a newly discovered species of water spider or amoeba."[60] "They're not even in our phylum," one might imagine Justice Powell protesting. "And that one's a prokaryote! Who let all this riffraff into our law?"[61]

I do not mean, of course, to harangue Justice Powell for a benighted view that he has probably ameliorated. The fact remains, though, that he missed the obvious link between ecological and educational diversity. If a Supreme Court Justice could belittle ecological diversity within two weeks of venerating its educational variant, we can readily explain (if not excuse) how the rest of the legal world has missed the same connection for two decades. But having "walk[ed] by the color purple in [the] field"[62] that was October Term 1977 without noticing this wondrous confluence of two diversity cases, we surely deserve the damnable deadlock that the affirmative action debate has become.

The failure to connect *Bakke* with *Hill* has inflicted a deep wound on affirmative action scholarship. The time for the cure has come. The concept of biodiversity underlying the Endangered Species Act is "an especially rich source of analogies to affirmative action."[63] And analogy, after all, is the

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[56] Tennessee Valley Auth. v. Hill, 437 U.S. 153, 197 n.3 (Powell, J., dissenting).

[57] *Id.*

[58] *Id.* (citation omitted).

[59] *Id.* at 204 (quoting Church of the Holy Trinity v. United States, 143 U.S. 457, 459 (1892)).

[60] *Id.* at 203-04.

[61] *Cf.* PINK FLOYD, *In the Flesh, on* THE WALL (Sony 1977).

[62] ALICE WALKER, THE COLOR PURPLE 167 (1982) (asserting that this sin of omission "pisses God off").

[63] Chen, *supra* note 10, at 1869.

engine that drives science and art alike toward new frontiers.[64] Although I have twice declined to pursue "the endangered species analogy for fear of triggering charges of racism and biological determinism,"[65] I shall now examine educational diversity through the lens of biological diversity. What diffidence has hitherto deterred, boredom now compels. Life is a hundred times too short for us to bore ourselves.[66]

Inspired by Edward O. Wilson's bold proclamation that we stand on the verge of uniting human knowledge under a biological umbrella,[67] I shall survey evolutionary biology—and several other fields where diversity is legally significant—in search of insights into the diversity rationale in educational affirmative action. Darwin's "idea of evolution [of] natural selection," modestly described as "the single best idea anyone has ever had," unifies "[i]n a single stroke . . . the realm of life, meaning, and purpose with the realm of space and time, cause and effect, mechanism and physical law."[68] We can demand of it nothing less than the missing link between diversity as a legal rationale and educational affirmative action as it has actually evolved.

If anything, the analogical link between species protection and affirmative action has strengthened in the decades since *Bakke*. Texas's loss in *Hopwood* and the voluntary termination of affirmative action in California threaten to remove certain groups from these states' public universities. Defenders of affirmative action have infused new rhetorical power into one of their loudest battle cries. Contemporary trends portend the bifurcation of American education into one cluster of "overwhelmingly white and Asian-American school[s]" and another of "overwhelmingly black and Hispanic schools."[69] An

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[64] *See, e.g.*, ALBERT EINSTEIN & LEOPOLD INFELD, THE EVOLUTION OF PHYSICS: THE GROWTH OF IDEAS FROM EARLY CONCEPTS OF RELATIVITY AND QUANTA 3–4 (1938) (describing "a deep and fortunate analogy" as the key to unlocking "some essential feature hidden beneath the surface of external differences"); HIDEKI YUKAWA, CREATIVITY AND INTUITION: A PHYSICIST LOOKS EAST AND WEST 114 (John Bester trans., 1973) (describing how "notic[ing] the similarity of" a novelty "to some other thing which [the observer] understands quite well" can be the beginning of "really creative" thinking); *cf.* WALKER PERCY, *Metaphor as Mistake*, *in* THE MESSAGE IN THE BOTTLE: HOW QUEER MAN IS, HOW QUEER LANGUAGE IS, AND WHAT ONE HAS TO DO WITH THE OTHER 64, 65 (1975) (describing metaphors as "misnamings, misunderstandings, or misrememberings" that "result[ ] in an authentic poetic experience").

[65] Chen, *supra* note 10, at 1870; *accord* Chen, *supra* note 21, at 1158 n.215.

[66] *See* FRIEDRICH NIETZSCHE, *Beyond Good and Evil*, *in* BASIC WRITINGS OF NIETZSCHE 346, 346 (Walter Kaufmann ed. & trans., The Modern Library 1992) (1885).

[67] *See* EDWARD O. WILSON, CONSILIENCE: THE UNITY OF KNOWLEDGE (1998).

[68] DANIEL C. DENNETT, DARWIN'S DANGEROUS IDEA: EVOLUTION AND THE MEANINGS OF LIFE 21 (1995).

[69] McLaughlin v. Boston Sch. Comm., 938 F. Supp. 1001, 1008 (D. Mass. 1996);

"inexorable zero," the "glaring absence of minority" students from elite institutions, rouses the faithful.[70] This inexorable zero is to affirmative action as extinction is to species protection. Extirpating a group from any environment, whether educational or natural, diminishes that environment's diversity, for all its stakeholders.

I shall argue that a hard look at other forms of diversity and the laws designed to protect them undermines the case for protecting the sort of diversity that *Bakke* celebrated. Part II shows how judges, lawyers, and commentators no longer distinguish diversity from analytically distinct rationales for affirmative action. Part III explores diversity in several settings outside affirmative action, ranging from species protection and the regulation of elections, campaign finance, and mass communications to bilingual education and religious freedom. Part IV, a census of relevant groups in these categories, provides a logarithmic look at diversity by the numbers. Part V then describes the utilitarian and aesthetic values served by the preservation of diversity. Part VI compares and contrasts the measures that the law takes to protect these disparate types of diversity. Part VII concludes that educational affirmative action, in its own realm, accomplishes few if any of the purposes served by the Endangered Species Act—the strongest and most intelligibly conceived legal system for protecting diversity of any kind. Unlike its biological analogue, *Bakke* fails to define, much less to promote, educational diversity.

II. UP FROM DIVERSITY

> *Our civilization comprehends great variety and complexity, and this variety and complexity, playing upon a refined sensibility, must produce various and complex results. The poet must become more and more comprehensive, more allusive, more indirect, in order to force, to dislocate if necessary, language into his meaning.* —T.S. Eliot[71]

A. *Dishonesty in Defense of Diversity Is No Virtue*

"Everybody talks about diversity, but no one knows what it means."[72]

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accord Wessman v. Boston Sch. Comm., 996 F. Supp. 120, 131 (D. Mass. 1998).

[70] International Bhd. of Teamsters v. United States, 431 U.S. 324, 342 n.23 (1977) (quoting United States v. T.I.M.E.-D.C., Inc., 517 F.2d 299, 315 (5th Cir. 1975)); *accord* Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 204 (1989) (Blackmun, J., dissenting); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 541–42 (1989) (Marshall, J., dissenting); Johnson v. Transportation Agency, 480 U.S. 616, 656–57 (1987) (O'Connor, J., concurring in the judgment).

[71] T. S. Eliot, *The Metaphysical Poets*, *in* THE HOGARTH ESSAYS 212, 221 (1928).

[72] Chen, *supra* note 10, at 1849.

Although "the word diversity appears with incantatory frequency" in the relevant cases and commentary, "it is never defined."[73] Race-conscious practices in university admissions, not to mention faculty hiring, have become so elaborate that scholars distinguish among "at least five methods . . . covered under the umbrella of affirmative action."[74] Unfortunately, "how all this promotes [educational] diversity is mysterious, and [is] left unexplained."[75] This will not do. Lest the majestic promise of "equal protection of the laws" be reduced to a "splendid bauble[ ],"[76] how can the government "use racial classifications . . . without knowing what the central classifying concepts means?"[77] A government that would divide and distribute on the basis of race "cannot abdicate its responsibility to define 'racial diversity' and to determine what degree of racial diversity . . . is sufficient."[78]

Just what is diversity? As a matter of doctrinal coherence, it must be distinguished from competing rationales for affirmative action. If Justice Powell's opinion in *Bakke* retains any value, diversity must mean something besides the governmental interests that Justice Powell considered but rejected.[79] In other words, whatever diversity is, it cannot be a synonym for proportional representation, remedying societal discrimination, or community service.

Remedying institutional discrimination—the original definition of the term "affirmative action"[80] and to this day an undisputedly lawful rationale for the

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[73] Schurz Communications, Inc. v. FCC, 982 F.2d 1043, 1054 (7th Cir. 1992).

[74] David Benjamin Oppenheimer, *Understanding Affirmative Action*, 23 HASTINGS CONST. L.Q. 921, 926 (1996) ("There are at least five methods of race- and gender-conscious practices which are covered under the umbrella of affirmative action: (1) quotas, (2) preferences, (3) self-studies, (4) outreach and counseling, and (5) anti-discrimination.").

[75] *Schurz*, 982 F.2d at 1055; *see also* Note, *An Evidentiary Framework for Diversity as a Compelling Interest in Higher Education,* 109 HARV. L. REV. 1357, 1362 (1996) (conceding that educators have no precise means by which to measure diversity).

[76] The Civil Rights Cases, 109 U.S. 3, 48 (1883) (Harlan, J., dissenting).

[77] Ho v. San Francisco Unified Sch. Dist., 147 F.3d 854, 864–65 (9th Cir. 1998).

[78] Taxman v. Board of Educ., 91 F.3d 1547, 1564 (3d Cir. 1996), *vacated as moot*, 118 S. Ct. 595 (1997).

[79] *Compare* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 311–19 (1978) (opinion of Powell, J.) (identifying and upholding the diversity rationale) *with id.* at 305–11 (opinion of Powell, J.) (considering, and rejecting in turn, the rationales of proportional representation, remedying societal discrimination, and community service).

[80] *See generally* Frank W. Andritzky & Joseph G. Andritzky, *Affirmative Action: The Original Meaning*, 17 LINCOLN L. REV. 249 (1987) (describing the original meaning of the term "affirmative action" as embodied in the National Labor Relations Act of 1935, 29 U.S.C. § 160(c) (1994), and the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(g) (1994)); Carol R. Goforth, *"What Is She?": How Race Matters and Why It Shouldn't*, 46 DEPAUL L. REV. 1, 70–72 (1996) (same).

practice—is in many senses the polar opposite of diversity. The contrast between forward-looking diversity and backward-looking remedies has become a staple of Justice Stevens's jurisprudence[81] and fodder for a multitude of less powerful commentators.[82] In fact, one could argue that diversity and remedying past discrimination are incompatible and mutually exclusive.[83] "[L]imit[ing] education diversity to those racial groups who could show that they were victims of past discrimination" would be "quite inconsistent" with *Bakke*'s brand of "broad-based diversity."[84] Finally, although diversity shares the crucial defect that sank the role model argument—both rationales "are ageless in their reach into the past, and timeless in their ability to affect the future"[85]—

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[81] *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 242 (1995) (Stevens, J., dissenting); Metro Broad., Inc. v. FCC, 497 U.S. 547, 601 (1990) (Stevens, J., concurring); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 511–13 (1989) (Stevens, J., concurring in part and concurring in judgment); Johnson v. Transportation Agency, 480 U.S. 616, 646–47 (1987) (Stevens, J., concurring); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 313–15 (1986) (Stevens, J., dissenting). *See generally* Donald L. Beschle, *"You've Got to be Carefully Taught": Justifying Affirmative Action After* Croson *and* Adarand, 74 N.C. L. REV. 1141, 1154–57 (1996) (contrasting Justice Stevens's apparent preference for "a forward-looking approach to affirmative action" with the Court's affinity for remedial affirmative action).

[82] *See, e.g.*, Michael K. Braswell et al., *Affirmative Action: An Assessment of Its Continuing Role in Employment Discrimination Policy*, 57 ALB. L. REV. 365, 402, 405–06 (1993); Richard Delgado, *Why Universities Are Morally Obligated to Strive for Diversity: Restoring the Remedial Rationale for Affirmative Action*, 68 U. COLO. L. REV. 1165, 1165–66 (1997); Sheila Foster, *Difference and Equality: A Critical Assessment of the Concept of "Diversity,"* 1993 WIS. L. REV. 105, 107–08; Charles R. Lawrence III, *Each Other's Harvest: Diversity's Deeper Meaning*, 31 U.S.F. L. REV. 757 (1997); Kathleen M. Sullivan, *Sins of Discrimination: Last Term's Affirmative Action Cases*, 100 HARV. L. REV. 78, 84, 96–98 (1986); Tseming Yang, *Race, Religion, and Cultural Identity: Reconciling the Jurisprudence of Race and Religion*, 73 IND. L.J. 119, 173–74 (1997); *cf.* Jeffrey S. Byrne, *Affirmative Action for Lesbians and Gay Men: A Proposal for True Equality of Opportunity and Workforce Diversity*, 11 YALE L. & POL'Y REV. 47, 70–72 (1993) (extending the tension between forward- and backward-looking rationales to a discussion of affirmative action for lesbians and gay men).

[83] *See* Hopwood v. Texas, 78 F.3d 932, 966 n.24 (5th Cir. 1996) (Wiener, J., specially concurring); Chen, *supra* note 10, at 1865–66; *cf.* Fullilove v. Klutznick, 448 U.S. 448, 552 n.30 (1980) (Stevens, J., dissenting) (asking why merely "six racial classifications, and no others," appeared in a minority set-aside program).

[84] Lackland H. Bloom, Jr., Hopwood, Bakke *and the Future of the Diversity Justification*, 29 TEX. TECH L. REV. 1, 32 (1998).

[85] *Wygant*, 476 U.S. at 276 (plurality opinion of Powell, J.); *see also* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 307 (1978) (opinion of Powell, J.) (describing "societal discrimination" as "an amorphous concept of injury that may be ageless in its reach into the past"); Adeno Addis, *Role Models and the Politics of Recognition*, 144 U. PA. L.

Justice Powell's rejection of the role model rationale in *Wygant* requires us to give diversity a separate meaning.

Bakke endeavored to distinguish constitutionally permissible diversity from the pretenders. "[T]he state interest that would justify consideration of race or ethnic background," Justice Powell wrote, "is not an interest in simple ethnic diversity."[86] Rather, genuine, constitutionally sanctioned diversity "encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single (though important) element."[87] By and large, however, judges, litigants, and commentators have mangled the definition of diversity. *Fubar*, one of many acronyms invented by the American military during World War II, applies with full force here. Diversity: fouled up beyond all recognition.[88]

This is not to suggest that every court since *Bakke* has misunderstood or misapplied the diversity concept. In the broadcasting dispute that became *Metro Broadcasting*, the District of Columbia Circuit refused to equate diversity with proportional representation.[89] The same court complained that the Federal Communications Commission (FCC) had extended the term "diversity," previously used to describe the goal of "[d]econcentrating ownership" of television and radio stations, to the conceptually distinct objective of "allocating licenses on the basis of the applicants' race, for the purpose of generating programs 'targeted' at specific ethnic groups."[90] With both *Croson* and *Metro Broadcasting* as binding precedent before it, the Seventh Circuit successfully distinguished "disadvantage, *diversity*, or other grounds favoring" official race-consciousness from "remedying discrimination against minorities."[91]

REV. 1377, 1467–68 (1996) ("The popularity of the [role model] concept has been inversely related to its clarity."); *cf.* Note, *supra* note 75, at 1364 (arguing, apparently without irony, that "race-conscious decisionmaking should be permitted as long as race-blind decision making is not achieving diversity").

[86] *Bakke*, 438 U.S. at 315 (opinion of Powell, J.).

[87] *Id.*; *accord, e.g.*, *Hopwood*, 78 F.3d at 965 (Wiener, J., specially concurring).

[88] Many an American veteran undoubtedly remembers a stronger "translation" of *fubar*. *See* SAVING PRIVATE RYAN (Dreamworks 1998) (establishing that the acronym does not have a German origin). Mindful that one person's lyric is often another's vulgarity, *cf.* Cohen v. California, 403 U.S. 15, 25 (1971), I shall stick to the milder version.

[89] *See* Shurberg Broad. of Hartford, Inc. v. FCC, 876 F.2d 902, 919 n.24 (D.C. Cir. 1989) ("By itself, racial diversity of ownership is conceptually no different from racial balance in the workplace."), *rev'd sub nom.* Metro Broad., Inc. v. FCC, 497 U.S. 547 (1990).

[90] Winter Park Communications, Inc. v. FCC, 873 F.2d 347, 357 (D.C. Cir. 1989) (Williams, J., concurring in part and dissenting in part), *aff'd sub nom. Metro Broadcasting*, 497 U.S. at 547.

[91] Milwaukee County Pavers Ass'n v. Fiedler, 922 F.2d 419, 422 (7th Cir.) (emphasis

Likewise, *Taxman* spotted the difference between "corrective efforts to confront racial segregation or chronic minority underrepresentation" and "non-remedial racial diversity goal[s]."[92] In a case addressing law school admissions, a federal district court differentiated between diversity and the school's interest in redressing "the low number of minority members of the bar and the manifestly low proportion of minority lawyers" in New York.[93]

Most cases, however, are far less precise in defining diversity. Judging by the dissimilar and contradictory uses of diversity in the reported cases, an observer would be hard pressed to define the term. Perhaps racial diversity means nothing more than racially integrated housing.[94] Or maybe diversity is merely outreach, "a conscientious effort to reach out to worthy candidates whose inclusion will enrich the educational experience for all who participate."[95] Then again, with a distant echo of antitrust law's market power concept,[96] might we prefer a definition of diversity under which "no racial or ethnic group wields absolute electoral control"?[97]

The greater part of the case law, however, even at the Supreme Court, treats the term "diversity" as though it were synonymous with a doctrinally distinct rationale for affirmative action. The language of proportional representation pervades many discussions of diversity. For instance, "a racially diverse police force" is by definition one that is "integrated and . . . reflective of the community at large."[98] Other litigants and judges have stressed

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added), *cert. denied*, 500 U.S. 954 (1991).

[92] Taxman v. Board of Educ., 91 F.3d 1547, 1561 (3d Cir. 1996), *vacated as moot*, 118 S. Ct. 595 (1997).

[93] Davis v. Halpern, 768 F. Supp. 968, 980 (E.D.N.Y. 1991).

[94] *See* South-Suburban Hous. Ctr. v. Greater S. Suburban Bd. of Realtors, 713 F. Supp. 1068, 1086 (N.D. Ill. 1988).

[95] Wessmann v. Boston Sch. Comm., 996 F. Supp. 120, 128 (D. Mass. 1998) (emphasis omitted).

[96] *See, e.g.*, Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 469–80 (1992); Cargill, Inc. v. Monfort of Colo., Inc., 479 U.S. 104, 119 & n.15 (1986); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 590 (1986); NCAA v. Board of Regents, 468 U.S. 85, 112 (1984); Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 12–18 (1984); Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 44, 52 & n.19 (1977); United States v. General Dynamics Corp., 415 U.S. 486, 496–97 (1974); United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 380–81 (1956); Associated Press v. United States, 326 U.S. 1, 9–12 (1945); United States v. Aluminum Co. of Am., 148 F.2d 416, 427–28 (2d Cir. 1945). *See generally* William M. Landes & Richard A. Posner, *Market Power in Antitrust Cases*, 94 HARV. L. REV. 937 (1981) (providing an economic analysis of "market power").

[97] Barnett v. City of Chicago, 969 F. Supp. 1359, 1459 (N.D. Ill. 1997).

[98] Hayes v. North Carolina State Law Enforcement Officers Ass'n, 10 F.3d 207, 213

proportionality in educational settings[99] and even in controversies over judicial nominating committees.[100]

The fetish of proportional representation is especially frustrating in light of the refusal of the Voting Rights Act Amendments of 1982[101] to enshrine this right.[102] Then again, if the Supreme Court could make a travesty[103] of the proviso that nothing in Title VII "shall be interpreted to require . . . preferential treatment . . . to any group because of . . . race [or] color,"[104] we should expect if not excuse comparably shabby behavior in other racially charged legal settings.

Given the incompatibility of diversity with remedial affirmative action, one might expect the courts to distinguish forward-looking diversity from backward-looking remedies. One would be wrong. A district court equated "a racially diverse learning environment" with one of the classic remedial aspirations of school desegregation, the "goal of avoiding racial identifiability in a school."[105] For its part, the Supreme Court, including Justice Powell, has routinely described diversity as a component of desegregation decrees aimed at *de jure* discrimination in public schooling.[106] Even Justice Stevens, otherwise a

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(4th Cir. 1993).

[99] *See, e.g.*, Hunter v. Regents of the Univ. of Cal., 971 F. Supp. 1316, 1328–29 (C.D. Cal. 1997); Ayers v. Fordice, 879 F. Supp. 1419, 1467 (N.D. Miss. 1995) (stressing "the extent to which diversity is *represented* at various levels of university life" and asserting that a "more racially diverse faculty will be associated with a more positive racial climate" (emphasis added)).

[100] *See* Back v. Carter, 933 F. Supp. 738, 757 (N.D. Ind. 1996); Mallory v. Harkness, 895 F. Supp. 1556, 1560 (S.D. Fla. 1995).

[101] Pub. L. No. 97-205, 96 Stat. 131 (1982) (codified as amended at 42 U.S.C §§ 1973 to 1973aa–6 (1994)).

[102] *See* 42 U.S.C. § 1973(b) (1994) (providing explicitly "[t]hat nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population"). *See generally* Thornburg v. Gingles, 478 U.S. 30, 35 (1986) (explaining Congress's intent to override *City of Mobile v. Bolden*, 446 U.S. 55 (1980)); S. REP. No. 97-417, at 28–29 (1982) (same), *reprinted in* 1982 U.S.C.C.A.N. 177, 206–07.

[103] *See* United Steelworkers of Am. v. Weber, 443 U.S. 193, 206 (1979) (emphasizing that Congress failed to pass a proviso to the effect that "nothing in Title VII shall be interpreted to permit voluntary affirmative efforts to correct racial imbalances"); *cf., e.g.*, Bernard Meltzer, *The* Weber *Case: The Judicial Abrogation of the Antidiscrimination Standard in Employment*, 47 U. CHI. L. REV. 423, 456 (1980) (arguing that *Weber*'s decision to permit voluntary affirmative action by private employers upset "the bargain struck by the 88th Congress" and abrogated its "color-blind aspirations").

[104] 42 U.S.C. § 2000e-2(j) (1994).

[105] Vaughns v. Board of Educ., 742 F. Supp. 1275, 1307 (D. Md. 1990).

[106] *See* Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 472–73 (1982); Estes v. Metropolitan Branches of Dallas NAACP, 444 U.S. 437, 451 (1980) (Powell, J., dissenting);

champion of diversity as a prospectively oriented rationale, has effectively equated diversity with the remedial purpose of "protect[ing] historically disadvantaged groups against discrimination."[107] In his words, an employer achieves diversity whenever it introduces new participants into "a category of employment that had been almost an exclusive province of [others] in the past."[108]

In refusing to elevate diversity to a compelling interest for equal protection purposes, the District of Columbia Circuit recently pondered how the various uses of the word diversity have generated one of the law's deepest linguistic mysteries:

> Perhaps this is illustrative as to just how much burden the term "diversity" has been asked to bear in the latter part of the 20th century in the United States. It appears to have been coined both as a permanent justification for policies seeking racial proportionality in all walks of life ("affirmative action" has only a temporary remedial connotation) and as a synonym for proportional representation itself.[109]

Ah, if only commentators could subject judicial opinions to the standards of review in administrative law! The courts' spotty record on affirmative action is arbitrary, capricious, and an abuse of diversity.[110]

Diversity's definitional problem poses a real crisis for university administrators. Many educators desperately seek license to adjust racial balance within their faculties and among their students. As Patsy Cline reputedly said, though, "People in hell want ice water, but that don't mean they get any."[111] Few if any American universities can "demonstrate a history of constitutional or statutory violations sufficient to warrant . . . remedial" affirmative action.[112] Ordinarily a university would be delighted to hear a court proclaim a complete absence of "evidence that . . . the [university] has ever engaged in

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Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 486–87 (1979) (Powell, J., dissenting).

[107] Johnson v. Transportation Agency, 480 U.S. 616, 646 (1987) (Stevens, J., concurring) (emphasis omitted).

[108] *Id.*

[109] Lutheran Church-Mo. Synod v. FCC, 141 F.3d 344, 356 (D.C. Cir. 1998).

[110] *See* Chen, *supra* note 21, at 1141; *cf.* 5 U.S.C. § 706(2)(A) (1994) (stating the "arbitrary, capricious, an abuse of discretion" standard for judicial review of administrative agency actions).

[111] SWEET DREAMS (Paramount 1986).

[112] Gabriel J. Chin, Bakke *to the Wall: The Crisis of* Bakkean *Diversity*, 4 WM. & MARY BILL OF RIGHTS J. 881, 886 (1996).

discrimination against [historically] underrepresented groups."[113] The City University of New York's law school, however, greeted this very declaration with grave disappointment, for it constituted a judicial rebuke of its affirmative action program. Like hell itself, affirmative action really has become "the world turned upside down."[114] If the University of Texas School of Law, home of *Sweatt v. Painter*,[115] cannot base an affirmative action program on historical discrimination,[116] you really have to wonder whether any other schools can. For the vast majority of American universities, *Bakke*'s vision of diversity is the only available affirmative action rationale.[117] Modest though it be, the "fig leaf" of diversity has enabled race-conscious educators to pursue "primary purpose[s] . . . other than diversity"—role modeling, community service, and proportional representation for its own sake, or as a basis for patronage.[118] Even affirmative action's defenders admit "that the diversity justification has been seriously abused by educational institutions."[119] "Diversity!" as a battle cry[120] "is simply not the most honest statement of . . . objective[s]."[121]

In the end, we need not decide whether the courts and commentators are disoriented, deluded, or dishonest. "For [constitutional] purposes, it matters not which of these things occurred."[122] The problem remains the same. No one has offered a meaningful definition of diversity, much less a "strong basis in evidence" that race-based affirmative action promotes diversity.[123] The law's

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[113] Davis v. Halpern, 768 F. Supp. 968, 981 (E.D.N.Y. 1991).

[114] Chen, *supra* note 10, at 1847.

[115] 339 U.S. 629 (1950).

[116] *See* Hopwood v. Texas, 78 F.3d 932, 944 (5th Cir. 1996); *see also id.* at 953 (suggesting that today's racially "hostile environment" at the University of Texas results from "present societal discrimination and, if anything, is contributed to, rather than alleviated by, the overt and prevalent consideration of race in admissions").

[117] *See* Chen, *supra* note 10, at 1859; Chin, *supra* note 112, at 930.

[118] Chin, *supra* note 112 at 902–03; *see also, e.g.*, Kingsley R. Browne, *Affirmative Action: Policy-making by Deception*, 22 OHIO N.U. L. REV. 1291, 1293–95 (1996); Kent Greenawolt, *The Unresolved Problems of Reverse Discrimination*, 67 CAL. L. REV. 87, 122 (1979).

[119] Bloom, *supra* note 84, at 72.

[120] *See generally* Paul D. Carrington, *Diversity!*, 1992 UTAH L. REV. 1105 (noting academia's rally towards the diversity banner and advocating that such a banner hinders civil rights).

[121] Wayne McCormack, *Race and Politics in the Supreme Court:* Bakke *to Basics*, 1979 UTAH L. REV. 491, 530.

[122] Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 865 (1984).

[123] Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 277 (1986) (plurality opinion of

collective "failure to render a reasoned" explanation should be, "as always, reversible error."[124] "No more is required, no less is accepted."[125] Whether caused by disarray or dissembling, the deep void that diversity has become cannot justify the constitutionally shaky practice of affirmative action.[126] Like law at large, the arcane law of affirmative action can no longer endure as an autonomous enterprise.[127] If we would entertain any hope of defining diversity, we had better consult analogous areas of greater bodies of nonlegal knowledge, all untouched by the poisonous hand of race.

B. *Creativity in Pursuit of Truth Is No Vice*

This sad state of affairs need not continue, for "the law abounds with concepts of diversity."[128] We can enrich the affirmative action debate through analogies drawn from elections and campaign finance, mass communications, plant variety protection, endangered species protection, and even bilingual education policy. Although comparisons to these seemingly disparate fields will operate at a high rather than "low or intermediate level of abstraction," the "incompletely theorized" notions of diversity that emerge will supply a certain "principled consistency."[129]

The definition of biodiversity provides a good starting point. The Office of Technology Assessment has defined "biological diversity" as "[t]he variety and variability among living organisms and the ecological complexes in which they occur."[130] The concept embraces diversity not only *among* species but also *within* species.[131] Species with exceedingly few members are vulnerable to inbreeding depression—genetic deterioration over inbred generations that

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Powell, J.); *accord* City of Richmond v. J.A. Croson Co., 477 U.S. 469, 498, 505 (1989); *see also* Note, *supra* note 75, at 1360 (conceding that universities must meet this evidentiary standard in defending their asserted interest in diversity).

[124] Citizens Comm. to Keep Progressive Rock v. FCC, 478 F.2d 926, 934 (D.C. Cir. 1973).

[125] *Id.*

[126] *Cf.* Coalition for Econ. Equity v. Wilson, 110 F.3d 1431, 1446 (9th Cir. 1997) (describing affirmative action as a practice the Constitution "barely permits").

[127] *See generally* Richard A. Posner, *The Decline of Law as an Autonomous Discipline: 1962–1987*, 100 HARV. L. REV. 761, 778 (1987).

[128] Chen, *supra* note 10, at 1868.

[129] Cass R. Sunstein, *On Analogical Reasoning*, 106 HARV. L. REV. 741, 746 (1993) (emphasis omitted).

[130] UNITED STATES CONGRESSIONAL OFFICE OF TECHNOLOGY ASSESSMENT, TECHNOLOGIES TO MAINTAIN BIOLOGICAL DIVERSITY 313 (1987).

[131] *See id.* at 37–38; EDWARD O. WILSON, THE DIVERSITY OF LIFE 88 (1992).

expose small populations to an exaggerated risk of extinction.[132] Even if a species made scarce eventually recovers, it may never recover the full range of genetic differences that its members once boasted.[133] Finally, although the species is the fundamental unit of biodiversity,[134] the concept also subsumes the processes by which ecosystems operate—mutation and natural selection.[135]

What ties it all together, in biology and elsewhere, is a sense that *difference matters*. The law invariably begins with a static definition of diversity and ends with a dynamic rationale for its protection. There must be a *variety* of actors, plus a cogent way for classifying them. At a minimum, diversity in law begins with a census of all the relevant groups and a schematic, if static, method for understanding the relationship among these groups. Count, then classify.

But there is more. The study of biodiversity begins (but does not end) with the Linnaean enterprise of sorting all living things into kingdoms, phyla, classes, orders, families, genera, and species.[136] It may well be, "as the Chinese say," that the "first step to wisdom is getting things by their right names."[137] If so, the second step surely is understanding how things relate to one another. No matter how we identify and structure groups, the groups and their members must interact in a meaningful, productive way. There should be more than a single party in a polity, a single network in broadcast television. An "ecosystem," after all, consists of interconnected "organisms in a community plus the associated abiotic factors with which they interact."[138] Neither biological diversity nor any other variant depends on numbers alone. For example, species protection preserves not only the mere number of species in any ecosystem, but also the dense network of relationships among species.[139]

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[132] *See* O.H. FRANKEL & MICHAEL E. SOULÉ, CONSERVATION AND EVOLUTION 59–61 (1981); Ian Robert Franklin, *Evolutionary Changes in Small Populations*, *in* CONSERVATION BIOLOGY: AN EVOLUTIONARY-ECOLOGICAL PERSPECTIVE 135, 140–41 (Michael E. Soulé & Bruce A. Wilcox eds., 1980); Russell Lande, *Genetics and Demography in Biological Conservation*, 241 SCIENCE 1455, 1456–57 (1988).

[133] *See* Edward O. Wilson, *The Current State of Biological Diversity*, *in* BIODIVERSITY 3, 11 (E.O. Wilson ed., 1988).

[134] *See* ERNST MAYR, EVOLUTION AND THE DIVERSITY OF LIFE 522–23 (1976); Michael T. Ghiselin, *Categories, Life, and Thinking*, 4 BEHAV. & BRAIN SCI. 269, 269–70 (1981).

[135] *See* WILSON, *supra* note 131, at 75–93.

[136] *See* WILSON, *supra* note 67, at 3–4.

[137] *Id.* at 4; *see also* WILSON, *supra* note 131, at 44.

[138] HELENA CURTIS & N. SUE BARNES, BIOLOGY: PART 2—BIOLOGY OF ORGANISMS, at G-7 (5th ed. 1989).

[139] *See, e.g.*, COUNCIL ON ENVTL QUALITY, LINKING ECOSYSTEMS AND BIODIVERSITY 135 (photo. reprint 1992); Stephen M. Johnson, United States v. Lopez*: A Misstep, But Hardly Epochal for Federal Environmental Regulation*, 5 N.Y.U. ENVTL. L.J. 33, 81 (1996);

Consider how Edward Wilson credits Ernst Mayr's "New Synthesis [of] . . . evolution and modern genetics" for having opened Edward Wilson's young eyes to the dynamism of the natural world: "Static pattern slid into fluid process. . . . Scale expanded, and turned continuous. . . . The animals and plants I loved so dearly reentered the stage as lead players in a grand drama. Natural history was validated as a real science."[140]

The quest for diversity in all of these contexts exhibits a second, albeit more elusive, quality. The law routinely invokes a *utilitarian* justification for diversity. The mere presence of a second political party gives meaning to democratic governance. Distinct varieties and species of plants give rise to pharmaceuticals for distinct ailments, to foods for all seasons and against all famines. But beyond the quantifiable benefits of diversity, there is an aesthetic sense that difference should exist for its own sake. Thus, even if the Navajo tongue had provided no national service in the Pacific theater of World War II, the aboriginal languages of North America are worth preserving.

With these observations in mind, I shall progress from static to dynamic, thence from the descriptive to the prescriptive. From the biosphere to the land-grant campus and in the many realms in between, I will describe diversity by the numbers. How many species are there? Distinct breeds of domestic animals? Human races? Then I shall ask the pragmatist's questions: What is diversity good for? What purposes does it serve? The answer necessarily includes a discussion of diversity's dynamic processes. Finally, on the assumption that diversity does indeed deliver benefits, I ask how the law protects diversity.

This is admittedly a roundabout way of addressing a straightforward doctrine. But the sorry state of the debate leaves me no choice. Bear with me as I borrow a seductive chess metaphor.[141] Even the number of moves in chess are finite; the variations on the affirmative action argument are far less numerous. In our version of the game, every argumentative gambit has failed, and the players keep slumping inexorably toward perpetual check. My battle plan embodies two strategies that, I hope, will speed us toward a successful endgame. First, since it has become clear that the "diversity" concept is the single piece holding together the entire argumentative apparatus of educational

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J.B. Ruhl, *Biodiversity Conservation and the Ever-Expanding Web of Federal Laws Regulating Nonfederal Lands: Time for Something Completely Different?*, 66 U. COLO. L. REV. 555, 567–78 (1995).

[140] WILSON, *supra* note 67, at 4 (citing ERNST MAYR, SYSTEMATICS AND THE ORIGIN OF SPECIES (1942)).

[141] *Cf.* T.S. Eliot, *The Waste Land*, *in* COLLECTED POEMS 1909–1962, at 51 (1963) ("A Game of Chess"). I am not the first to borrow a chess metaphor in discussing affirmative action, *e.g.*, Glazer, *supra* note 36, and I probably will not be the last.

affirmative action, I hope to overload the concept by asking precisely how much weight it can bear, in more legal contexts than I really intend to address. Second, mindful of the futility of all frontal attacks on such matters as the appropriate measure of racial justice and the social significance of race, I shall try something different and unexpected. Taking a hard look at diversity in every legal context except this one epitomizes a *Zwischenzug* strategy: shock them with a flurry of action in a seemingly unrelated area, then return to the business at hand.

One final note of caution is in order. Throughout this article I shall explore "diversity" as the concept has come to be understood in ecology and evolutionary biology. In matters of race, "biology" is often a dirty word. A belief in race as a biological phenomenon[142] drove such travesties as Nazi ideology and the Tuskegee syphilis study. More generally, under the sway of the Standard Social Science Model, many American intellectuals distrust biology.[143]

Let me allay those fears. This article emphatically does not seek, in the fashion of *The Bell Curve*,[144] to propound hypotheses on racial differences in performance. My whole point is that "race" has no coherent biological meaning. Even the Supreme Court agrees with that proposition.[145] "As a strictly sociopolitical phenomenon lacking any basis in biology, race lives and dies by law."[146] Nor will I conduct a comparative analysis of social adaptation strategies in order to predict which groups will win a socioeconomic battle for "survival of the fittest." Whatever might be said for the sociobiological origins of the Constitution,[147] the Fourteenth Amendment surely did not enact Herbert

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[142] *See generally* STEPHEN JAY GOULD, THE MISMEASURE OF MAN 20–29 (1st ed. 1981) (illustrating the faults of "biological determinism"); IAN F. HANEY LOPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE 27–33 (1996) (documenting legal efforts to assign people to racial classifications based putatively on biological principles).

[143] So much that the principal intellectual project of the century to come may be the dismantling, root and branch, of the Standard Social Science Model. *See generally* THE ADAPTED MIND: EVOLUTIONARY PSYCHOLOGY AND THE GENERATION OF CULTURE (Jerome H. Barkow et al. eds., 1992) [hereinafter THE ADAPTED MIND]; CARL N. DEGLER, IN SEARCH OF HUMAN NATURE: THE DECLINE AND REVIVAL OF DARWINISM IN AMERICAN SOCIAL THOUGHT (1991).

[144] RICHARD J. HERRNSTEIN & CHARLES MURRAY, THE BELL CURVE: INTELLIGENCE AND CLASS STRUCTURE IN AMERICAN LIFE 269–340 (1994).

[145] *See* Saint Francis College v. Al-Khazraji, 481 U.S. 604, 610 n.4 (1987).

[146] Chen, *supra* note 21, at 1163.

[147] In point of fact, quite a bit can be said. *See* John O. McGinnis, *The Human Constitution and Constitutive Law: A Prolegomenon*, 8 J. CONTEMP. LEGAL ISSUES 211 (1997); John O. McGinnis, *The Original Constitution and Our Origins*, 19 HARV. J.L. & PUB. POL'Y 251 (1996); *cf.* E. Donald Elliot, *The Evolutionary Tradition in Jurisprudence*,

Spencer's "Social Statics."[148] Richard Delgado's imaginary friend, Rodrigo, seems to have picked up a dreadful bookbag smelling of eugenics,[149] but none of those books were on my summer reading list. It is not Social Darwinism but *real* Darwinism that concerns me.[150]

When evolution is liberated from those who would distort it for ideological advantage, its hallmark becomes far clearer. Evolution is not the sort of game that can be won. Every member of the biosphere is locked in an eternal struggle for mere survival, with no prospects of "advancing" past its predators, parasites, or competitors.[151] Diversity, not progress in the sense of an inexorable march toward increasing complexity, is the true hallmark of evolution.[152] Indeed, greater sophistication in distinguishing environmental from the genetic determinants of human performance has reaffirmed our common humanity.

Uneven initial advantages conferred by geography, compounded over time, and twisted by historical accidents, account for most of the differences.[153] No

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85 COLUM. L. REV. 38 (1985); Mark I. Roe, *Chaos and Evolution in Law and Economics*, 109 HARV. L. REV. 641 (1996). To explain the full extent to which Darwinian insights can inform the law is, alas, another task "I [must] leave for another time," though perhaps not "another scholar." Jim Chen, *The Mystery and the Mastery of the Judicial Power*, 59 MO. L. REV. 281, 282 (1994).

148 *See* Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting); *see also* DENNETT, *supra* note 68, at 393 (describing Herbert Spencer's "Social Darwinism" as an "odious misapplication of Darwinian thinking in defense of political doctrines that range from callous to heinous").

149 *See* Richard Delgado, *Rodrigo's Bookbag: Brimelow, Bork, Hernstein, Murray, and D'Souza—Recent Conservative Thought and the End of Equality*, 50 STAN. L. REV. 1929 (1998) (reviewing PETER BRIMELOW, ALIEN NATION: COMMON SENSE ABOUT AMERICA'S IMMIGRATION DISASTER (1995); ROBERT H. BORK, SLOUCHING TOWARD GOMORRAH: MODERN LIBERALISM AND AMERICAN DECLINE (1996); HERNSTEIN & MURRAY, *supra* note 144; and DINESH D'SOUZA, THE END OF RACISM: PRINCIPLES FOR A MULTIRACIAL SOCIETY (1995), and concluding that these books collectively advance "biological theories of racial inferiority").

150 *See generally* JOHN KENNETH GALBRAITH, THE AFFLUENT SOCIETY 56–64 (1958) (explaining the influence of Social Darwinism on American thought in the late nineteenth century); RICHARD HOFSTADTER, SOCIAL DARWINISM IN AMERICAN THOUGHT (rev. ed. 1959).

151 *See* RIDLEY, *supra* note 23, at 63–67 (explaining the Red Queen hypothesis in contemporary evolutionary theory); Leigh Van Valen, *A New Evolutionary Law*, 1 EVOLUTIONARY THEORY 1 (1973) (same).

152 *See* STEPHEN JAY GOULD, FULL HOUSE: THE SPREAD OF EXCELLENCE FROM PLATO TO DARWIN 15–16, 172–73 (1996).

153 *See* JARED DIAMOND, GUNS, GERMS, AND STEEL: THE FATES OF HUMAN SOCIETIES 103, 405–08 (1997).

longer can the racist explain Europe's historic dominance of Africa as a matter of genes.[154] To inject biology into discussions of race is to risk condemnation in the court of legal commentary,[155] but I shall not shrink from the task. "The more forbidding the task, the greater the prize for those who dare to undertake it."[156]

III. L'HOMME ET L'ANIMAL

Let us go, through certain half-deserted streets,
The muttering retreats
Of restless nights in one-night cheap hotels
And sawdust restaurants with oyster-shells:
Streets that follow like a tedious argument
Of insidious intent
To lead you to an overwhelming question. . .
Oh, do not ask, "What is it?"
Let us go and make our visit. —T.S. Eliot[157]

As we begin to dissect diversity, I shall impose a consciously arbitrary but provisional sense of order. I shall classify fields as seemingly disparate as elections and campaign finance, mass communications, agriculture, ecology, and human languages according to the dichotomy perfected by the French philosopher Alain: the line between human "culture" and bestial "nature."[158]

Speech will represent the cultural side of this equation. Unlike either feeding[159] or breeding,[160] the uniquely human phenomenon of speech receives explicit constitutional protection. So much for constitutional discourse on the "two and only two [Darwinian] forces that matter," food and sex.[161] But

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[154] *See id.* at 401 ("[T]he different historical trajectories of Africa and Europe stem ultimately from differences in real estate.").

[155] *See* Neil Gotanda, *Chen the Chosen: Reflections on* Unloving, 81 IOWA L. REV. 1585, 1590–91 (1996); Alfred C. Yen, *Unhelpful*, 81 IOWA L. REV. 1573, 1579 (1996).

[156] WILSON, *supra* note 67, at 209.

[157] T.S. Eliot, *The Love Song of J. Alfred Prufrock*, *in* COLLECTED POEMS 1909–1962, at 3 (1963).

[158] *See generally* ALAIN, L'HOMME ET L'ANIMAL (1962).

[159] *See* Dandridge v. Williams, 397 U.S. 471, 484 (1970) (holding that the First Amendment does not remedy disparities in welfare payments).

[160] *See, e.g.*, Planned Parenthood v. Casey, 505 U.S. 833, 847–48 (1992); Roe v. Wade, 410 U.S. 113, 152–53 (1973); Griswold v. Connecticut, 381 U.S. 479, 481–82 (1965); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).

[161] Jim Chen, *Law as a Species of Language Acquisition*, 73 WASH. U. L.Q. 1263, 1278 n.99 (1995). For a compelling argument that the legal left has unwisely swapped its

Bakke's vision of diversity does rest unquestionably on a First Amendment foundation,[162] and "[l]anguage is how most of us get both" food and sex.[163] If we would understand how affirmative action enhances a university's interest in diversity, we should study the concept in legal contexts where speech is more directly and more explicitly regulated in the name of diversity.

By contrast, natural resource exploitation, whether through agriculture or the "taking" of plant and animal species and their wild habitats, will represent the natural side. Rather ironically, the emerging view of the natural world through the four-letter code (ATCG)[164] of molecular biology allows us to imagine living things as copyrightable subject matter[165]—and to decipher DNA's double helix, the code by which Gaia, Mother Earth, has encrypted the "concept of existence" and "the mystery of . . . life."[166]

A. *Speak Now*

Speech is a natural subject for a study of diversity. The untamed market not only spurs product differentiation but also encourages uniformity. Modern free speech law represents the most important remnant of a broader laissez-faire jurisprudence.[167] To borrow a Darwinian metaphor, we might describe the plea for free speech as the last surviving member of a once-populous libertarian family tree.[168] Free speech slides into a Darwinian framework with great ease.

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constitutional commitment to welfare rights (*i.e.*, food) for a "Clintonified" defense of abortion (*i.e.*, sex), see Mark A. Graber, *The Clintonification of American Law: Abortion, Welfare, and Liberal Constitutional Theory*, 58 OHIO ST. L.J. 731 (1997).

[162] *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 313 (1978) (opinion of Powell, J.); Chen, *supra* note 10, at 1863–64.

[163] Chen, *supra* note 161, at 1278 n.99.

[164] These letters represent the component bases of deoxyribonucleic acid (DNA): adenine, thymine, cytosine, and guanine.

[165] *See, e.g.*, Irving Kayton, *Copyright in Living Genetically Engineered Works*, 50 GEO. WASH. L. REV. 191 (1982); Doreen M. Hogle, Comment, *Copyright for Innovative Biotechnological Research: An Attractive Alternative to Patent or Trade Secret Protection*, 5 HIGH TECH. L.J. 75 (1990); Donna Smith, Comment, *Copyright Protection for the Intellectual Property Rights to Recombinant Deoxyribonucleic Acid: A Proposal*, 19 ST. MARY'S L.J. 1083 (1988).

[166] Planned Parenthood v. Casey, 505 U.S. 833, 851 (1992).

[167] *See* Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1414 (1986); Kathleen M. Sullivan, *Free Speech and Unfree Markets*, 42 UCLA L. REV. 949, 952–53 (1995); *cf.* Coase, *supra* note 24 (speculating on why opponents of restrictions on speech nevertheless often support restrictions on the economic marketplace).

[168] *Cf.* GOULD, *supra* note 142, at 72 (arguing that the human tendency to reify the last surviving "remnants of a remnant" as "false icon[s] of progress" is to fall victim to "life's

As "an unmistakable" form of "universal acid," evolution "eats through just about every traditional concept, and leaves in its wake a revolutionized world-view."[169] Already, scholars have begun to adapt economics to a new intellectual world reshaped by Darwinian thought.[170] Two shakes of interdisciplinary pollen from positive political theory or microeconomics connect this school of thought—and with it the entire Darwinian apparatus—to free speech.

We can break down this realm even further according to the constitutional divide between "core" and "commercial" speech. Political speech, of the sort at issue in campaigns and elections, is quintessential "core" speech.[171] By contrast, although the sort of speech typically at issue in controversies over structural regulation of radio, broadcast television, and cable does not fit the precise definition of "commercial" speech,[172] these cases routinely adopt some standard of review below strict scrutiny.[173] That the Supreme Court has applied strict scrutiny to restrictions on political speech in broadcast media merely reinforces the distinction.[174] This doctrinal phenomenon is usually blamed on "scarcity" and other characteristics of the *conduits* by which mass media travel,[175] but it is also a question of *content*.[176] Even though the presence of a

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little joke").

[169] DENNETT, *supra* note 68, at 63.

[170] *See generally* RICHARD R. NELSON & SIDNEY G. WINTER, AN EVOLUTIONARY THEORY OF ECONOMIC CHANGE (1982) (borrowing ideas from biology to form economic theory); THE ELGAR COMPANION TO INSTITUTIONAL AND EVOLUTIONARY ECONOMICS A-K (Geoffrey M. Hodgson et al. eds., 1994); Giovanni Dosi & Richard R. Nelson, *An Introduction to Evolutionary Theories in Economics*, 4 J. EVOLUTIONARY ECON. 153 (1994); Elliott, *supra* note 147, at 62–71; Roe, *supra* note 147.

[171] *Compare* Buckley v. Valeo, 424 U.S. 1, 19 (1976) (per curiam) (recognizing the spending of money as speech, provided that the money finances a political campaign) *with* Breard v. City of Alexandria, 341 U.S. 622, 642 (1951) (refusing to accord constitutional value to speech about the spending of money, at least in the absence of a political agenda) *and* Valentine v. Chrestensen, 316 U.S. 52, 54 (1942) (same).

[172] *See* Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 761 (1976) (defining as "commercial" that speech which can be reduced to the simple message, "I will sell you the X [item] at the Y price").

[173] *See generally* Ashutosh Bhagwat, *Of Markets and Media: The First Amendment, the New Mass Media, and the Political Components of Culture*, 74 N.C. L. REV. 141, 172–76 (1995) (documenting and disputing the prevailing tendency among constitutional scholars to exclude mass media from "core" political speech).

[174] *See* Columbia Broad. Sys., Inc. v. Democratic National Comm., 412 U.S. 94 (1973); *cf.* CBS, Inc. v. FCC, 453 U.S. 367, 396 (1981) (holding that there is a "*limited* right to 'reasonable' access" to the media for political candidates).

[175] *See, e.g.*, Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 637–39 (1994); FCC v. League of Women Voters, 468 U.S. 364, 376 n.11 (1984); FCC v. Pacifica Found., 438

profit motive should not diminish the constitutional commitment to free speech, the dominant tradition of American constitutionalism undervalues—and arguably devalues—speech delivered by electronic channels of mass communication.[177]

1. *Party Animals*

Political parties are the basic organizational unit of American politics. To be sure, broader groups of citizens enjoy rights of association even in the absence of an imminent political agenda,[178] and the increasingly popular device of direct referendum creates political coalitions limited in time and in scope.[179]

The Supreme Court often invokes some notion of political fairness without purporting to define it, much less prescribing how it is to be achieved.[180] But parties remain the focus of many constitutional cases on elections and political parties.[181] In extreme circumstances, a dominant political party *becomes* the state and captures state law as an instrument of self-regulation.[182] Whatever vitality remains in *Buckley v. Valeo*'s[183] protection of individual candidates' right to spend money on their campaigns[184] appears to extend to parties.[185]

U.S. 726, 748 (1978); Red Lion Broad. Co. v. FCC, 395 U.S. 367, 388 (1969).

176 *See* Bhagwat, *supra* note 173, at 163–64 (emphasis added).

177 *See, e.g.*, CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 17–28 (1993); Fiss, *supra* note 167, at 1410–16. *See generally* Lawrence B. Sager, *Fair Measure: The Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 122 (1978) (discussing the Court's "underenforcement of constitutional norms" within the framework of the Fourteenth Amendment).

178 *See, e.g.*, Hurley v. Irish-American Gay, Lesbian & Bisexual Group, 515 U.S. 557, 566 (1995); Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290, 295 (1981); NAACP v. Button, 371 U.S. 415, 428 (1963).

179 *See, e.g.*, *Citizens Against Rent Control*, 454 U.S. at 298. *See generally* Philip P. Frickey, *The Communion of Strangers: Representative Government, Direct Democracy, and the Privatization of the Public Sphere*, 34 WILLAMETTE L. REV. (forthcoming 1998); Philip P. Frickey, *Interpretation on the Borderline: Constitution, Canons, Direct Democracy*, 1996 ANN. SURV. AM. L. 477.

180 *See, e.g.*, Gaffney v. Cummings, 412 U.S. 735, 753 (1973); Reynolds v. Simms, 377 U.S. 533, 565–66 (1964).

181 *See generally* Daniel Hays Lowenstein, *Associational Rights of Major Political Parties: A Skeptical Inquiry*, 71 TEX. L. REV. 1741 (1993).

182 *See* Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 653–54 (1998).

183 424 U.S. 1 (1976).

184 *See id.* at 45.

185 *See* Colorado Republican Fed. Campaign Comm. v. FEC, 518 U.S. 604, 627 (1996)

Whether they involve primaries,[186] conventions,[187] ballot access,[188] or patronage,[189] the Supreme Court's cases share a common element: diversity in political parties should not be reduced to a one-party monopoly. This principle is vividly illustrated in the *White Primary Cases*[190] and in *Davis v. Bandemer*,[191] in which the Court recognized an equal protection claim against political gerrymandering designed to annihilate the losing party in future elections.[192] Similarly, in cases invalidating popular referenda, the Court has frowned upon efforts to restructure the lawmaking process to the permanent detriment of a political minority.[193] What is sauce for the popular referendum, so it seems, is sauce also for more republican forms of government.

(Kennedy, J., concurring).

[186] *See, e.g.*, Tashjian v. Republican Party, 479 U.S. 208 (1986).

[187] *See, e.g.*, Democratic Party of United States v. Wisconsin *ex rel.* La Follette, 450 U.S. 107 (1981).

[188] *See, e.g.*, American Party v. White, 415 U.S. 767 (1974); Jenness v. Fortson, 403 U.S. 431 (1971); Williams v. Rhodes, 393 U.S. 23 (1968).

[189] *See* O'Hare Truck Serv., Inc. v. City of Northlake, 518 U.S. 712 (1996); Board of County Comm'rs v. Umbehr, 518 U.S. 668 (1996); Rutan v. Republican Party, 497 U.S. 62 (1990); Branti v. Finkel, 445 U.S. 507 (1980); Elrod v. Burns, 427 U.S. 347 (1976).

[190] *See* Terry v. Adams, 345 U.S. 461 (1953); Smith v. Allwright, 321 U.S. 649 (1944); Grovey v. Townsend, 259 U.S. 45 (1935); Nixon v. Condon, 286 U.S. 73 (1932); Nixon v. Herndon, 273 U.S. 536 (1927). *See generally* Issacharoff & Pildes, supra note 182, at 652–68.

[191] 478 U.S. 109, 143 (1986).

[192] *See generally* Peter H. Schuck, *The Thickest Thicket: Partisan Gerrymandering and Judicial Regulation of Politics*, 87 COLUM. L. REV. 1325 (1987) (articulating justifications underlying the Court's regulation of partisan gerrymandering in *Bandemer*).

[193] *See* Romer v. Evans, 517 U.S. 620, 633 (1996) (invalidating a state constitutional amendment that "classifies homosexuals not to further a proper legislative end, but to make them unequal to everyone else"); Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 483 (1982) (condemning an initiative that "burden[ed] all future attempts to integrate [public] schools . . . by lodging decisionmaking authority over the question at a new and remote level of government"); Hunter v. Erickson, 393 U.S. 385, 393 (1969) (equating efforts to "disadvantage any particular group by making it more difficult to enact legislation on its behalf" with the undisputedly unconstitutional tactics of "dilut[ing] any person's vote or giv[ing] any group a smaller representation than another of comparable size"). *But cf.* Crawford v. Board of Educ., 458 U.S. 527, 537 (1982) (upholding a popular referendum that "forb[ade] state courts to order pupil school assignment or transportation in the absence of a Fourteenth Amendment violation").

2. *We Want the Airwaves*[194]

Somewhere outside the political "core" of the First Amendment, mass media companies supply the speech that defines much of the popular and political character of the United States. Outside the environmental context, mass communications regulation provides perhaps the deepest body of law dedicated to the preservation of diversity. The obsession with diversity arises from the essential terms and conditions of competition in mass communications. Except in the rarefied realm of pay-per-view, mass communicators compete for audience share and advertising revenues by nonprice means—by providing interesting, diverse content and viewpoints.[195] In a world of expanding entertainment options,[196] audiences that find insufficient "variety or heterogeneity" in available programming will find other ways to spend their leisure time.[197]

Although the Communications Act of 1934[198] evidently "intended to leave competition in the business of broadcasting where it found it, to permit a licensee . . . to survive or succumb according to his ability to make his programs attractive to the public,"[199] the Federal Communications Commission's policy and practice prescribe otherwise. The FCC's extensive legal arsenal resists private concentration of media resources and disperses ownership among discrete individuals in the hopes that diverse programming will ensue.[200] The Supreme Court has described the goal of "assuring that the public has access to a multiplicity of informational sources [as] a governmental purpose of the highest order," one that "promotes values central to the First Amendment."[201]

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[194] THE RAMONES, *We Want the Airwaves*, *on* PLEASANT DREAMS (Warner Bros. 1981).

[195] *See* FCC v. WNCN Listeners Guild, 450 U.S. 582, 588 n.13 (1981); Bhagwat, *supra* note 173, at 164 (suggesting that customer preference in media markets is based on the content of speech); Jim Chen, *The Last Picture Show (On the Twilight of Federal Mass Communications Regulation)*, 80 MINN. L. REV. 1415, 1428–29 (1996) (stating that competition "expresses itself through diversity in program content and viewpoint").

[196] *See generally* HAROLD L. VOGEL, ENTERTAINMENT INDUSTRY ECONOMICS: A GUIDE FOR FINANCIAL ANALYSIS (3d ed. 1994) (documenting drastic changes in leisure-time activities between 1970 and 1990).

[197] Schurz Communications, Inc. v. FCC, 982 F.2d 1043, 1054 (7th Cir. 1992).

[198] Ch. 652, 48 Stat. 1064 (1934) (codified as amended at 42 U.S.C. § 151 (1994)).

[199] FCC v. Sanders Bros. Radio Station, 309 U.S. 470, 475 (1940).

[200] *See, e.g.*, FCC v. Midwest Video Corp., 440 U.S. 689, 699 (1979); FCC v. National Citizens Comm. for Broad., 436 U.S. 775, 796–97 (1978).

[201] Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 663 (1994); *cf.* FCC v. Pottsville

As in affirmative action and species conservation, mass communications law assumes that diversity is both precious and precarious. The very market forces that Congress and the FCC trust to sort winning from losing broadcasters also threaten diversity. The problem of radio format changes illustrates just how closely communications law tracks environmental law's extinction narrative. When the last classical station in Kalamazoo converts to country, or hip-hop hijacks the last jazz station in Jackson, the range of listener choice tightens:

> Most format changes . . . do not diminish the diversity available, and "are thus left to the give and take of each market environment and the business judgment of the licensee." In [one] case, however, the format proposed to be abandoned was allegedly unique and its loss would affect diversity, thereby implicating the public interest in the change. . . .
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> . . . .
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> . . . We think it axiomatic that preservation of a format [that] would otherwise disappear, although economically and technologically viable and preferred by a significant number of listeners, is generally in the public interest.[202]

Incidentally, this description of a common phenomenon should not be confused with the law; neither the FCC nor the Supreme Court has endorsed this approach. With explicit approval from the Court, the FCC leaves format changes to the vagaries of the market.[203]

The assumption that broadcasters' self-interest is more effective than direct regulation in encouraging diverse programming is the exception rather than the rule.[204] By the same token, however, the FCC only rarely engages in direct regulation of its licensees' programming decisions. The Commission's statutory mandate, after all, forbids "censorship."[205] Children's television is a major departure from this principle; after years of wrangling,[206] the FCC recently

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Broad. Co., 309 U.S. 134, 137 (1940) ("Congress moved under the spur of a widespread fear that in the absence of governmental control the public interest might be subordinated to monopolistic domination in the broadcasting field.").

[202] Citizens Comm. to Save WEFM v. FCC, 506 F.2d 246, 261, 268 (D.C. Cir. 1974).

[203] *See* FCC v. WNCN Listeners Guild, 450 U.S. 582, 600–03 (1981).

[204] For another rare expression of this minimalist regulatory sentiment, see Report & Order, 49 F.C.C.2d 1090, 1105–06 (1974) (invoking this rationale to justify the recission of a mandatory origination rule).

[205] *See* 47 U.S.C. § 326 (1994); *cf.* Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969) ("It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount.").

[206] *See, e.g.*, Action for Children's Television v. FCC, 821 F.2d 741, 746 (D.C. Cir.

adopted a rule setting aside a fixed portion of the weekly television schedule for educational programming designed primarily for children.[207]

Although the strategy of prescribing a scarce but specifically desired form of programming should be regarded as an outgrowth of the FCC's historical solicitude for children, the regulation of children's television does present a salient factual oddity.[208] The FCC is perfectly capable of setting aside portions of the broadcast day for a favored form of programming. As befits a revolutionary application of mass media and free speech law to affirmative action,[209] we should note and resolve this "fundamental novelt[y] of fact and theory."[210] If the FCC seeks locally produced, minority-oriented, or other scarce and "diverse" programming, why doesn't the Commission simply command that such programs be shown during lucrative portions of the broadcast day?[211] Alternatively, to the extent we dismiss the children's television rule as "an elitist [complaint] that viewers demand less children's programming is desired in Washington," we can lay aside the "constitutionally questionable" strategy of "content control of all broadcasters" in favor of "government subsidies for those . . . who have the desire and expertise to develop [appropriate] programming."[212] The answer to this mystery will reveal itself after an examination of the FCC's full regulatory arsenal.

1987) (refusing to allow the FCC to eliminate commercialization guidelines for children's television on a rationale that abandoned the longstanding regulatory "premise that the television marketplace does not function adequately when children make up the audience") (emphasis omitted); Washington Ass'n for Television & Children v. FCC, 712 F.2d 677, 679 (D.C. Cir. 1983) (declining to impose a flat requirement that television licensees broadcast a minimum amount of regularly scheduled children's programming each week).

207 *See* Final Rule: Children's Television, 61 Fed. Reg. 43,981 (Aug. 27, 1996).

208 *See, e.g.*, 47 U.S.C. § 303a (1994) (imposing limits on the duration of advertising in children's television programming); *id.* § 303b (directing the FCC to consider broadcast television licensees' efforts in children's programming when weighing renewal applications); Sable Communications, Inc. v. FCC, 492 U.S. 115, 124 (1989) (upholding an FCC rule that restricted children's access to "dial-a-porn" services); FCC v. Pacifica Found., 438 U.S. 726, 748 (1978) (upholding post-broadcast sanctions on a radio station that aired profane language during hours designated for "family listening").

209 *See* Chen, *supra* note 10, at 1846–50.

210 THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS 52 (1963).

211 *Cf.* Timothy L. Hall, *Educational Diversity: Viewpoints and Proxies*, 59 OHIO ST. L.J. 551, 568–71 (1998) (questioning "[w]hy academic institutions interested in creating a diverse exchange of ideas consider [ ] a variety of proxies, such as race and socioeconomic background, rather than . . . actual viewpoints and ideas").

212 Laurence H. Winer, *Children Are Not a Constitutional Blank Check*, *in* RATIONALES AND RATIONALIZATIONS: REGULATING THE ELECTRONIC MEDIA 69, 105 (Robert Corn-Revere ed., 1997).

For the most part, the FCC's pursuit of diversity relies on *structural* devices for promoting diversity. The Commission's complex strategies are arguably as "diverse"—as numerous and as varied—as the conduits and communicators at stake. A doctrinally and historically comprehensive review would swallow this article,[213] but it suffices to name a few exemplary approaches: comparative licensing,[214] the localist preference,[215] multiple ownership restrictions,[216] the "one-to-a-market"[217] and "duopoly" rules,[218] integration credits,[219] "chain broadcasting" rules,[220] rules on prime time access[221] and financial participation and syndication,[222] defensive regulation of intermodal alternatives to broadcast television (most notably cable),[223] "must-

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213 For a survey, see Chen, *supra* note 195.

214 *See* Ashbacker Radio Corp. v. FCC, 326 U.S. 327 (1945).

215 *See, e.g.*, FCC v. Allentown Broad. Corp., 349 U.S. 358, 362 (1955).

216 *See, e.g.*, United States v. Storer Broad. Co., 351 U.S. 192 (1956) (upholding a cap on the number of AM, FM, and television stations held by any single owner). *Compare* Multiple Ownership of AM, FM and Television Broad. Stations, 100 F.C.C.2d 74 (1984) (restricting any single owner to no more than 12 television stations or any combination of stations reaching more than 25% of the national television audience) *with* Telecommunications Act of 1996, Pub. L. No. 104-104, § 202(a), (c)(1), 110 Stat. 56, 110, 111 (1996) (relaxing restrictions on ownership of multiple TV stations and eliminating altogether restrictions on ownership of multiple radio stations).

217 *See* 47 C.F.R. § 73.3555(c) (1997) (restricting any owner to a single AM, FM, and broadcast television outlet in a single market).

218 *See* 47 C.F.R. § 73.3555(b) (1997) (restricting the amount of overlap between the signals of commonly owned radio or television stations).

219 *See* Bechtel v. FCC, 10 F.3d 875, 887 (D.C. Cir. 1993) (striking down the FCC's longstanding preference for broadcast licensees who proposed to "integrate" ownership and management in a single individual).

220 *See* National Broad. Co. v. United States, 319 U.S. 190, 224–27 (1943).

221 *See* National Ass'n of Indep. Television Producers & Distributors v. FCC, 516 F.2d 526 (2d Cir. 1975) (vacating FCC rules designed to reserve portions of the prime time television schedule for locally originated rather than network-supplied programming).

222 *See* Schurz Communications, Inc. v. FCC, 982 F.2d 1043, 1050 (7th Cir. 1992) (striking down an FCC rule restricting networks from holding financial interests or syndication rights in the programs they broadcast). Both PTAR and "fin/syn," as these rules are popularly known, have been repealed. *See* Radio Broad. Servs. & Television Program Practices, 60 Fed. Reg. 44,773, 44,773, 44,780 (Aug. 29, 1995) (repealing PTAR); Network Fin. Interest & Syndication Rules, 60 Fed. Reg. 48,907 (Sept. 21, 1995) (repealing "fin/syn").

223 *See, e.g.*, United States v. Midwest Video Corp., 406 U.S. 649 (1972) (upholding an FCC rule requiring cable systems with more than 3,500 subscribers to originate local programming); United States v. Southwestern Cable Co., 392 U.S. 157 (1968) (extending FCC jurisdiction to cable television); Time Warner Entertainment Co. v. FCC, 93 F.3d 957

carry"[224] and access channel obligations,[225] and cross-ownership restrictions designed to exclude telephone companies[226] and newspapers[227] from leveraging their power into broadcast markets.

These tools follow three basic regulatory strategies. First, on the assumption that dispersed ownership guarantees a greater number and therefore a greater variety of voices, the FCC combats concentrated ownership, especially at the actual broadcasting level (as distinct from the economically distinct sectors of program production and transmission).[228] *Metro Broadcasting, Inc. v. FCC*[229] applied this principle to a different sort of diversity: minority-oriented broadcasting. Second, cognizant that few if any local broadcasters have the resources to originate programs, the FCC tightly patrols the influence exercised by television networks over local affiliates.[230] Finally, the FCC jealously protects "free television"—advertiser-financed, over-the-air broadcasting—from competitive threats posed by more advanced video delivery technologies.[231]

(D.C. Cir. 1996) (upholding channel set-aside regulations that govern direct broadcast satellite systems).

[224] *See* Turner Broad Sys., Inc. v. FCC, 117 S. Ct. 1174, 1200 (1997); Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 630 (1994).

[225] *See* Denver Area Educ. Telecomms. Consortium, Inc. v. FCC, 518 U.S. 727 (1996) (reviewing a variety of rules regarding leased access and public access stations on cable systems); FCC v. Midwest Video Corp., 440 U.S. 689 (1979) (striking down FCC rules that imposed access channel requirements on large cable systems).

[226] *Compare* US West Inc. v. United States, 48 F.3d 1092, 1106 (9th Cir. 1994) (striking down a 1984 ban on "video programming" by telephone companies), *vacated*, 516 U.S. 1155 (1996) *and* Chesapeake & Potomac Tel. Co. v. National Cable Television Assoc., 42 F.3d 181, 198–203 (4th Cir. 1994) (same), *vacated*, 516 U.S. 415 (1996) *with* 47 U.S.C.A. § 573 (West Supp. 1998) (permitting telephone company ownership and operation of video programming facilities under a set of "open video systems" guidelines). *See generally* Glen O. Robinson, *The New Video Competition: Dances with Regulators*, 97 COLUM. L. REV. 1016 (1997) (analyzing the open video systems guidelines).

[227] *See* FCC v. National Citizens Comm. for Broad., 436 U.S. 775, 793–802 (1978) (upholding a ban on newspaper-broadcast combinations); *see also* News Am. Publ'g, Inc. v. FCC, 844 F.2d 800 (D.C. Cir. 1988) (recognizing the ban on newspaper-broadcast combinations).

[228] *See, e.g., National Citizens Comm.*, 436 U.S. at 794–95.

[229] 497 U.S. 547 (1990).

[230] *See* National Broad. Co. v. United States, 319 U.S. 190, 203 (1943).

[231] *See, e.g.*, Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 714 (1984) (recognizing the governmental interest in "protecting noncable households from loss of regular television broadcasting service due to competition from cable systems"); *In re* Advanced Television Sys. & Their Impact upon the Existing Television Broad. Serv., 10 F.C.C.R. 10,540, 10,540 (1995) (extolling the virtues of "[f]ree, over-the-air, universal broadcast television").

The only trouble is that "[e]ach of these propositions" concerning broadcast diversity "is demonstrably false."[232] Under certain conditions, concentration has the counterintuitive effect of enhancing rather than diminishing program diversity.[233] Larger, vertically integrated companies have greater financial and political resources for enhancing diversity.[234] Until 1990, the FCC knowingly kept the number of national television networks at three,[235] even though a higher number was feasible. This conscious choice, rooted in a desire to maximize opportunities for locally owned stations, effectively eliminated one of the easiest ways of "reduc[ing] the cost . . . of satisfying a taste for serving minority consumers": increasing the total number of broadcast channels.[236] This tradeoff between localism and minority broadcasting is so clear that the FCC has been able to make the exchange in the opposite direction. The Commission relaxed the traditional "Rule of Twelve," which capped the number of television stations in the hands of any single owner, for minority owners.[237] In defense of this *de facto* "Rule of Fourteen,"[238] the FCC reasoned that enhanced service to minority audiences would outweigh any harm that the marginal concentration in station ownership might inflict on competition among

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[232] Chen, *supra* note 195, at 1485.

[233] *See, e.g.*, Schurz Communications, Inc. v. FCC, 982 F.2d 1043, 1054 (7th Cir. 1992); Jack H. Beebe, *Institutional Structure and Program Choices in Television Markets*, 91 Q.J. ECON. 15 (1977); A. Michael Spence & Bruce M. Owen, *Television Programming, Monopolistic Competition, and Welfare*, 91 Q.J. ECON. 103 (1977); Matthew L. Spitzer, *Justifying Minority Preferences in Broadcasting*, 64 S. CAL. L. REV. 293, 304–19 (1991); Peter O. Steiner, *Program Patterns and Preferences and the Workability of Competition in Radio Broadcasting*, 66 Q.J. ECON. 194, 219–21 (1952).

[234] *See* Daniel L. Brenner, *Ownership and Content Regulation in Merging and Emerging Media*, 45 DEPAUL L. REV. 1009, 1026–29 (1996).

[235] *See* STANLEY M. BESEN ET AL., MISREGULATING TELEVISION: NETWORK DOMINANCE AND THE FCC 14–15 (1984); DOUGLAS H. GINSBURG ET AL., REGULATION OF THE ELECTRONIC MASS MEDIA: LAW AND POLICY FOR RADIO, TELEVISION, CABLE AND THE NEW VIDEO TECHNOLOGIES 266 (2d ed. 1991); THOMAS G. KRATTENMAKER & LUCAS A. POWE, JR., REGULATING BROADCAST PROGRAMMING 88, 283–84 (1995); Thomas G. Krattenmaker & L.A. Powe, Jr., *Converging First Amendment Principles for Converging Communications Media*, 104 YALE L.J. 1719, 1736 (1995).

[236] Spitzer, *supra* note 233, at 327; *see also* Jeff Dubin & Matthew L. Spitzer, *Testing Minority Preferences in Broadcasting*, 68 S. CAL. L. REV. 841 (1995) (supporting this proposition with econometric evidence).

[237] *See* 47 C.F.R. § 73.3555(e)(1)(ii), (e)(2)(i) (1997).

[238] *See generally* Chen, *supra* note 195, at 1447–48 (explaining the tension between the Rule of Twelve and the *de facto* Rule of Fourteen that the FCC fashioned on behalf of minority broadcasters).

broadcasters or on viewpoint diversity.[239]

The recently concluded *Turner Broadcasting* litigation[240] brings full circle the history of mass communications regulation. Radio and broadcast television, specifically exempted by the 1934 Act from common carrier obligations[241] and once seemingly liberated from the public utility model of regulation,[242] are now unquestionably the beneficiaries of what passes for affirmative action in federal mass communications law.[243] Cable television's "must-carry" obligations are consciously designed to benefit local over-the-air television stations. The Supreme Court's decision to sustain these rules has perfected the correlation between broadcast regulation and educational affirmative action. "[M]inority-oriented teaching and scholarship are the academic equivalent of underpowered and undervalued conventional television signals in an age of cable, video dialtone, and direct broadcast satellite."[244] The logic of "must-carry" runs lock-step with that of affirmative action: but for this set-aside, market forces would erase this threatened form of expression for an underrepresented constituency. This is the respect in which the "regulation of mass communications serves no purpose except to protect incumbents on the verge of technological and economic extinction.[245] Though we speak of law schools becoming "lily-

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[239] *See* Policies & Rules Regarding Minority & Female Ownership of Mass Media Facilities, 10 F.C.C.R. 2788, 2796 (1995). Both the Rule of Twelve and the Rule of Fourteen have yielded to a rule that any entity may own or control an unlimited number of broadcast television stations, as long as those stations reach no more than 35% of the national audience. *See* Telecommunications Act of 1996, Pub. L. No. 104-104, § 202(c)(1)(B), 110 Stat. 56, 111; Chen, *supra* note 195, at 1445–46.

[240] *See* Turner Broad. Sys., Inc. v. FCC, 117 S. Ct. 1174 (1997); Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622 (1994).

[241] *See* 47 U.S.C.A. § 153(10) (West Supp. 1998) ("[A] person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier.").

[242] *See, e.g.*, FCC v. Sanders Bros. Radio Station, 309 U.S. 470, 476 (1940) (holding that "economic injury to an existing station is not a separated and independent element to be taken into consideration" in broadcast licensing decisions); *In re* Application of Southeastern Enters., 22 F.C.C. 605, 610–12 (1957) (declaring the Commission powerless to consider the likelihood of incumbent broadcasters' economic failure in the wake of newly granted licenses); Paul M. Segal & Harry P. Warner, *"Ownership" of Broadcasting Frequencies: A Review*, 19 ROCKY MTN. L. REV. 111, 118 (1947) (proclaiming the "collapse of the public utility analogy" in federal broadcast licensing). On the collapse of the regulatory distinction between broadcasting and common carriage in communications law, see Howard A. Shelanski, *The Bending Line Between Conventional "Broadcast" and Wireless "Carriage,"* 97 COLUM. L. REV. 1048 (1997).

[243] *See* Chen, *supra* note 195, at 1481 (describing incumbent television broadcasters as "federal mass communication law's oldest and most gently pampered wards").

[244] Chen, *supra* note 10, at 1890.

[245] Chen, *supra* note 195, at 1471–72.

white"[246] and of local television stations "going dark,"[247] the superficial difference in chromatic imagery can scarcely mask the parallel rhetoric.

We thus come to the answer to the anomaly posed by children's television. The FCC does not direct diverse programming because it cares no more about expressive diversity than the typical law school faculty does. What both actors do care about is the distribution of benefits among favored parties.[248]

This sketch of mass communications law gives scant support for the notion that affirmative action can enhance expressive diversity. Efforts to restructure mass media markets have failed to improve the quality or diversity of broadcast speech, whether measured by conventional broadcasters' constant loss of audiences to competing providers of audiovisual programming, or by the abysmal quality of over-the-air television.[249] Federal mass communications law, deeper and older than educational affirmative action, strongly suggests that government cannot dictate diversity.

3. *Voice of America/Radio Free Europe*

The great irony of the American quest for mass media diversity is that virtually every other nation treats the United States as a threat to global cultural diversity. What is absolutely fascinating is that the sternest measures to exclude American cultural exports stem not from the traditional victims of Western colonialism and imperialism, but rather Canada and the European Union—the two places whose culture most closely overlaps that of the putative white majority in the United States.[250] This phenomenon contradicts the logic of affirmative action, but not evolutionary theory. Any naturalist understands that the fiercest competition for food and habitat comes from similar rather than

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[246] *See, e.g.*, Michael S. Greve, Hopwood *and Its Consequences*, 17 PACE L. REV. 1, 20 (1996) (quoting Douglas Laycock).

[247] Turner Broad. Sys., Inc. v FCC, 117 S. Ct. 1174, 1197 (1997) (quoting Meek Declaration ¶ 78 (App. 628)).

[248] *Compare* Chen, *supra* note 195, at 1482 ("Federal mass communications regulation has become a jobs program for favored broadcasters . . . .") *with* Chen, *supra* note 10, at 1892–93 ("[L]aw school faculties are less interested in true diversity and more interested in the allocation of goods to persons of particular racial backgrounds.") (internal quotation marks and footnote omitted).

[249] *See* Chen, *supra* note 195, at 1442–43.

[250] *See* SAMUEL P. HUNTINGTON, THE CLASH OF CIVILIZATIONS AND THE REMAKING OF WORLD ORDER 46–47 (1996) (defining the "West" as "Europe, North America, plus other European settler countries such as Australia and New Zealand" and "Western Civilization" as "Euroamerican or North Atlantic civilization").

dissimilar species.[251]

It is hard to overstate the vigor with which Canada and Europe have resisted homogenization by American cultural imports. Adopting the Orwellian-sounding directive of "Television Without Frontiers," the European Union has ordered member-states to reserve at least half of all television airtime for programs of European origin.[252] One sympathetic commentator argues "that Europe indeed suffers from a cultural crisis," and that the European Union should be given space to resist the "irreversible, deeply rooted changes" wrought by American cultural imports.[253]

Canada has gone even further, augmenting its own quotas against American programming with an extensive system of subsidies, discriminatory taxes, and discriminatory tax deductions.[254] Canada's cultural stand may be the hottest dispute—excluding only those involving salmon[255]—across the world's longest undefended international border. The fear is real: after watching more

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[251] *See, e.g.*, WILSON, *supra* note 131, at 173–74 (describing this phenomenon and the adaptive strategies of elasticity and character displacement).

[252] *See* Council Directive 89/522, 1989 O.J. (L 298) 23.

[253] Laurence G.C. Kaplan, Comment, *The European Community's "Television Without Frontiers" Directive: Stimulating Europe to Regulate Culture*, 8 EMORY INT'L L. REV. 255, 256 (1994).

[254] *See generally* Oliver R. Goodenough, *Defending the Imaginary to the Death? Free Trade, National Identity, and Canada's Cultural Preoccupation*, 15 ARIZ. J. INT'L & COMP. L. 203 (1998) (examining the rules set forth to protect cultural identity); Andrew M. Carlson, Note, *The Country Music Television Dispute: An Illustration of the Tensions Between Canadian Cultural Protectionism and American Entertainment Exports*, 6 MINN. J. GLOBAL TRADE 585 (1997); Amy E. Lehmann, Note, *The Canadian Cultural Exemption Clause and the Fight to Maintain an Identity*, 23 SYRACUSE J. INT'L L. & COM. 187 (1997); Robin L. Van Harpen, Note, *Mamas, Don't Let Your Babies Grow Up to Be Cowboys: Reconciling Trade and Cultural Independence*, 4 MINN. J. GLOBAL TRADE 165, 172 (1995) (illustrating Canada's "various . . . protectionist measures"). Canada's hard line against "split-run" editions of magazines with American content but Canadian advertising has triggered condemnation by the World Trade Organization. *See* Report of the Appellate Body in Canada—Certain Measures Concerning Periodicals, AB-1997-2, WT/DS31/AB/R (adopted June 30, 1997); Sean C. Aylward & Caroline M-L. Presber, *Trade, Culture, and Competition: WTO Overturns Canada's Excise Tax on "Split-Run" Publications*, 8 J. INT'L TAX'N 548 (1997); Aaron Scow, Note, *The* Sports Illustrated Canada *Controversy: Canada "Strikes Out" in Its Bid to Protect Its Periodical Industry from U.S. Split-Run Periodicals*, 7 MINN. J. GLOBAL TRADE 245 (1998).

[255] *See, e.g.*, Canada: Measures Affecting Exports of Unprocessed Herring & Salmon, BISD, 35th Supp. 98 (1989); *In re* Canada's Landing Requirements for Salmon & Herring, 12 INT'L TRADE REP, DEC. (BNA) 1026 (1991). *See generally* Daniel A. Farber & Robert E. Hudec, *Free Trade and the Regulatory State: A GATT's-Eye View of the Dormant Commerce Clause*, 47 VAND. L. REV. 1401, 1433–35 (1994) (discussing U.S.-Canada conflicts over salmon and other fishing interests).

than seven hundred hours of American television programming a year, the average ten-year-old Canadian takes yet another step toward becoming "an unarmed American with Medicare."[256] Canadian author Margaret Atwood describes her country's cultural crisis this way:

> Canada as a separate but dominated country has done about as well under the U.S. as women, worldwide, have done under men; about the only position they've ever adopted toward us, country to country, has been the missionary position, and we were not on top. I guess that's why the national wisdom *vis-à-vis* Them has so often taken the form of lying still, keeping your mouth shut, and pretending you like it.[257]

In short, in the global market for popular culture, Canada and Europe are the leading champions of quotas, set-asides, and other forms of affirmative action for culturally underrepresented and endangered voices.

B. *The Call of the Wild*

Why should lawyers stand alone in resisting "the innate tendency to focus on life and lifelike processes," the "biophilia" that leads us "to distinguish life from the inanimate" and to value "[n]ovelty and diversity"?[258] Even Justice Holmes, whatever his attitude toward claims grounded in human reproductive dignity,[259] readily spotted the "national interest of very nearly the first magnitude" in the conservation of migratory birds.[260] Let us explore and exploit the lessons that the natural world and our instincts would teach us.

Even the biosphere can be divided according to human activity. The most striking distinctions between human cultures arise from their primary modes of

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[256] Lehmann, *supra* note 254, at 200 (quoting Nina Munk, *Culture Cops*, FORBES, Mar. 27, 1995, at 42–43).

[257] Frank E. Manning, *Reversible Resistance: Canadian Popular Culture and the American Other*, *in* THE BEAVER BITES BACK? AMERICAN POPULAR CULTURE IN CANADA 4, 4 (David H. Flaherty & Frank E. Manning eds., 1993) (quoting Margaret Atwood), *quoted in* Goodenough, *supra* note 254, at 223.

[258] EDWARD O. WILSON, BIOPHILIA 1 (1984).

[259] *See* Buck v. Bell, 274 U.S. 200, 207 (1927) ("Three generations of imbeciles are enough.").

[260] Missouri v. Holland, 252 U.S. 416, 435 (1920) (describing these birds as "protectors of our forests and our crops" and as "food supply" in themselves). *But cf.* Cargill, Inc. v. United States, 516 U.S. 955, 956–59 (1995) (Thomas, J., dissenting from denial of certiorari) (questioning whether the presence of migratory birds on private land bears a constitutionally sufficient connection to interstate commerce).

food production—agriculture or foraging.[261] The exacting demands of horticulture and animal husbandry,[262] exacerbated by historical accidents,[263] have limited commonly cultivated plants and familiar domestic animals to a tiny fraction of the biosphere.[264] We can therefore divide the natural world between those organisms whose reproduction humans routinely control and those that are, metaphorically, "born free." On both sides of the divide, scarcity, extinction, and creeping homogeneity provide the impetus for legal protection of diversity.

1. *The Nature of the Farm*

The impulse to conserve endangered species began on the farm. Darwin opened *The Origin of Species*, after all, with a study of variation in domesticated plants and animals.[265] Industrialization and the consolidation of smaller farms were erasing entire varieties and breeds. Almost contemporaneously, the United States acknowledged agricultural diversity by ordering its newly established Department of Agriculture "to procure, propagate, and distribute among the people new and valuable seeds and plants."[266] This statute thus codified Thomas Jefferson's sentiment that "[t]he greatest service which can be rendered any country is to add a useful plant to its culture."[267]

The biological crisis faced by farms in Darwin's England has swept the globe. The already shallow pool of domestic plants and animals "is being

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261 *See* SUSAN ALLING GREGG, FORAGERS AND FARMERS: POPULATION INTERACTION AND AGRICULTURAL EXPANSION IN PREHISTORIC EUROPE 1–10, 21–35 (Karl W. Butzer & Leslie G. Freeman eds., 1988); Jim Chen, *Fugitives and Agrarians in a World Without Frontiers*, 18 CARDOZO L. REV. 1031, 1033–34 (1996).

262 *See* DIAMOND, *supra* note 153, at 114–30 (explaining plant domestication); *id.* at 157–75 (describing animal domestication).

263 *See, e.g.*, Jean L. Marx, *Amaranth: A Comeback for the Food of the Aztecs?*, 198 SCI. 40 (1977) (describing how amaranth ceased being cultivated widely because the Aztecs consumed it in a ritual "that the Spanish *conquistadores* considered a perverse parody of the Catholic Eucharist"). *See generally* NATIONAL RESEARCH COUNCIL, AMARANTH: MODERN PROSPECTS FOR AN ANCIENT CROP (1983).

264 *See, e.g.*, WILSON, *supra* note 131, at 287–89.

265 *See* CHARLES DARWIN, ON THE ORIGIN OF SPECIES BY MEANS OF NATURAL SELECTION 7–43 (Harvard Univ. reprint 1964) (1859).

266 Act of May 15, 1862, ch. 72, § 1, 12 Stat. 387 (codified as amended at 7 U.S.C.A. § 2201 (West Supp. 1998)).

267 Neil D. Hamilton, *Feeding Our Future: Six Philosophical Issues Shaping Agricultural Law*, 72 NEB. L. REV. 210, 249 (1993) (quoting THOMAS JEFFERSON'S FARM BOOK (Edwin M. Betts ed., 1976)).

[drained] as human population and economic pressures accelerate the pace of change in traditional agricultural systems."[268] What Darwin noticed of scarce species also applies to economic entities such as small farms: "during fluctuations in the seasons or in the number of its enemies," these rare entities "run a good chance of utter extinction."[269] The largely socioeconomic motivation for protecting small farms has always retained an ecological component. In matters such as soil conservation and open space preservation, such agroecological claims are dubious at best and fraudulent at worse.[270] Small farms, however, do preserve rare breeds and varieties *in situ*. Over many generations, traditional foraging and agrarian communities have amassed volumes of ethnobiological knowledge.[271] This knowledge, "if gathered and catalogued, would constitute a library of Alexandrian proportions."[272]

The extension of the industrial revolution to agriculture, one of the great triumphs of contemporary capitalism,[273] has exacted a steep price.[274] In

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[268] WORLD WATCH LIST FOR DOMESTIC ANIMAL DIVERSITY, at v (Beate D. Scherf ed., 2d ed. 1995) [hereinafter WORLD WATCH LIST]; *see also* WILSON, *supra* note 131, at 322 ("Small farms around the world are giving way to the monocultures of agrotechnology."); *cf.* Williamson v. Commissioner, 974 F.2d 1525, 1536 (9th Cir. 1992) (Reinhardt, J., dissenting) (bemoaning the fate of "the family farm, an-all-too-rapidly-vanishing remnant of our nation's rural past, . . . in our complex modern economy"). *See generally* Eric Christensen, Note, *Genetic Ark: A Proposal to Preserve Genetic Diversity for Future Generations*, 40 STAN L. REV. 279 (1987).

[269] DARWIN, *supra* note 265, at 109.

[270] *See, e.g.*, Harold F. Breimyer, *Agricultural Philosophies and Policies in the New Deal*, 68 MINN. L. REV. 333, 348–49 & n.65 (1983); Jim Chen & Edward S. Adams, *Feudalism Unmodified: Discourses on Farms and Firms*, 45 DRAKE L. REV. 361, 405–10 (1997); Jim Chen, *Get Green or Get Out: Decoupling Environmental from Economic Objectives in Agricultural Regulation*, 48 OKLA. L. REV. 333, 343–46 (1995).

[271] *See, e.g.*, Neil D. Hamilton, *Who Owns Dinner: Evolving Legal Mechanisms for Ownership of Plant Genetic Resources*, 28 TULSA L.J. 587, 655 (1993); Winona LaDuke, *Traditional Ecological Knowledge and Environmental Futures*, 5 COLO. J. INT'L ENVTL. L. & POL'Y 127 (1994); June Starr & Kenneth C. Hardy, Note, *Not by Seeds Alone: The Biodiversity Treaty and the Role for Native Agriculture*, 12 STAN. ENVTL. L.J. 85 (1993); Lester I. Yano, Comment, *Protection of the Ethnobiological Knowledge of Indigenous Peoples*, 41 UCLA L. REV. 443 (1993).

[272] WILSON, *supra* note 131, at 321.

[273] *See, e.g.*, JOHN H. DAVIS & RAY A. GOLDBERG, A CONCEPT OF AGRIBUSINESS 1–4 (1957); Jim Chen, *The American Ideology*, 48 VAND. L. REV. 809, 826–30 (1995).

[274] The exact connection between industrialization and the disappearance of farms and farmland is quite complex and demands more space than this article permits. One urban myth does bear immediate debunking: in the years since World War II, cropland losses in the United States are principally attributable to "lack of farm economic viability rather than urban encroachment." Luther Tweeten, *Food Security and Farmland Preservation*, 3 DRAKE J.

exchange for the capacity to feed hordes at home and abroad, the United States has lost many plant varieties and animal breeds. In the place of traditional farms as *in situ* preserves of domestic biodiversity, we now have a clutch of *ex situ* facilities. Against agricultural homogenization stands a "diffuse network of laboratories and research stations,"[275] including the National Seed Storage Laboratory in Ft. Collins, Colorado, and a chain of land-grant universities,[276] experiment stations,[277] and extension offices.[278] Guided by no specific statutory mandate, the Department of Agriculture preserves genetic diversity through a diffuse program of "research 'into the laws and principles underlying the basic problems of agriculture in its broadest aspects.'"[279]

We have yet to mention the impact of commercial breeders and seed companies. These enterprises lie at the heart of the ongoing, genetically engineered biotechnological revolution—the target of the newest debate over genetic diversity in agriculture. American law protects developers of asexually[280] and sexually reproduced plant varieties.[281] American courts have likewise extended utility patent protection to genetically engineered organisms.[282] A deep body of international law seeks to balance these

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AGRIC. L. 237, 243 (1998). Indeed, "urban development" has inflicted fewer "cropland losses" than "forest, grazing, recreation, wildlife, and other uses" of land. *Id.*

[275] NATIONAL RESEARCH COUNCIL, MANAGING GLOBAL GENETIC RESOURCES: THE U.S. NATIONAL PLANT GERMPLASM SYSTEM 1 (1991).

[276] *See* Morrill Land-Grant College Act, 7 U.S.C. §§ 301–329 (1994).

[277] *See* Hatch Act of 1887, 7 U.S.C. §§ 361a–361i (1994 & Supp. II 1996); Bankhead-Jones Act of 1935, 7 U.S.C. §§ 427, 427i (1994).

[278] *See* Smith-Lever Act of 1914, 7 U.S.C. §§ 341–349 (1994 & Supp. II 1996); *see also* Bazemore v. Friday, 478 U.S. 385, 389 (1986) (Brennan, J., concurring in part) (describing the work of the Extension Service in "home economics, agriculture, 4-H and youth, and community resource development").

[279] Foundation on Econ. Trends v. Lyng, 943 F.2d 79, 80–81 (D.C. Cir. 1991) (quoting 7 U.S.C. § 427 (1994)).

[280] *See* Plant Patent Act of 1930, 35 U.S.C. §§ 161–164 (1994); Yoder Bros. v. California-Florida Plant Corp., 537 F.2d 1347 (5th Cir. 1976).

[281] *See* Plant Variety Protection Act of 1970, 7 U.S.C. §§ 2321–2582 (1994); Asgrow Seed Co. v. Winterboer, 513 U.S. 179 (1995).

[282] *See* Diamond v. Chakrabarty, 447 U.S. 303 (1980) (microbes); *Ex parte* Allen, 2 U.S.P.Q.2d 1425 (BNA) (Apr. 3, 1987) (animals), *aff'd without opinion*, 846 F.2d 77 (Fed. Cir. 1988); *Ex parte* Hibberd, 227 U.S.P.Q. 443 (BNA) (Sept. 24, 1985) (plants); Policy on Patenting of Animals, 1077 Off. Gaz. Pat. Off. 24 (Apr. 21, 1987) (inviting applications for patents on transgenetic animals, excluding humans); Patent No. 4,736,866 (U.S. Patent Off. Apr. 12, 1988). *See generally* Robert P. Merges, *Intellectual Property in Higher Life Forms: The Patent System and Controversial Technologies*, 47 MD. L. REV. 1051 (1988) (describing the benefits of animal patents).

intellectual property rights with the competing interests of farmers and of the developing nations supplying most of the genetic material in the form of rare plant species.[283] These advances in biotechnology, especially when backed by powerful intellectual property rights, directly menace agricultural biodiversity.[284] Transgenic techniques, which involve the transfer of genes among organisms that do not naturally interbreed, pose the additional threat of genetic pollution should accidentally released chimeras intermingle with wild populations.[285]

2. *Live Free or Die*

The very existence of diverse species warrants and receives legal protection at the highest levels. Although the international community has endorsed endangered species protection through the CITES treaty[286] and the Rio conference,[287] the United States' own Endangered Species Act of 1973[288] is

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[283] *See* International Convention for the Protection of New Varieties of Plants, as revised at Geneva (Mar. 19, 1991), UPOV Doc. 221(E); Agreement on Trade-Related Aspects of Intellectual Property Rights, Annex 1C to the General Agreement on Tariffs and Trade, *opened for signature*, Apr. 15, 1994, *in* GATT SECRETARIAT, THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 365 (1994), GATT Sales No. 1994-4; United Nations Conference on Environment and Development, Convention on Biological Diversity, June 5, 1992, 31 I.L.M. 818 (1992); International Undertaking on Plant Genetic Resources, Report of the Conference of the Food and Agriculture Organization of the United Nations, 22d Sess., U.N. Doc. C/83/REP (1985); Interpretation of the International Undertaking on Plant Genetic Resources, Food and Agriculture Organization of the United Nations, 25th Sess., U.N. Doc. C/89/24 (1989). *See generally, e.g.*, Harold J. Bordwin, *The Legal and Political Implications of the International Undertaking on Plant Genetic Resources*, 12 ECOLOGY L.Q. 1053 (1985) (explaining the political implications of controlling genetic plant resources); Carlos M. Correa, *Sovereign and Property Rights over Plant Genetic Resources*, Commission on Plant Genetic Resources, Food and Agriculture Organization of the United Nations (Rome, Nov. 7–11, 1994) (Background Study Paper No. 2); Nicholas J. Seay, *Intellectual Property Rights in Plants*, *in* INTELLECTUAL PROPERTY RIGHTS: PROTECTION OF PLANT MATERIALS 61 (1993).

[284] *See* Hamilton, *supra* note 267, at 252–53; Hamilton, *supra* note 271, at 647–52.

[285] *See* Introduction of Organisms and Products Altered or Produced Through Genetic Engineering Which Are Plant Pests or Which There Is Reason to Believe Are Plant Pests, 52 Fed. Reg. 22,892, 22,906 (June 16, 1987) (to be codified at 7 C.F.R. pts. 330 & 340 (1998)); MINN. STAT. ANN. §§ 18F.01 to .12, 116C.91-96 (West 1998); North Carolina Biological Organism Act, N.C. GEN. STAT. §§ 106-65.42 to 47 (1997).

[286] *See* Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, 27 U.S.T. 1087 (entered into force July 1, 1975).

[287] *See* Convention on Biological Diversity, *supra* note 283.

[288] 16 U.S.C. §§ 1531–1543 (1994).

perhaps the strongest and most successful scheme for protecting biodiversity.[289]

The Endangered Species Act provides multiple layers of protection for "endangered"[290] and "threatened" species.[291] Section 4 requires the Secretary of Commerce or the Secretary of the Interior,[292] using "the best scientific and commercial data available,"[293] to determine whether any species is endangered or threatened[294] and to designate any "critical habitat."[295] In addition to publishing a list of all endangered and threatened species,[296] the Secretary of the Interior must also "develop and implement" recovery plans "for the conservation and survival of endangered species and threatened species . . . , unless he finds that such a plan will not promote the conservation of the species."[297] The threshold decisions to list and to designate critical habitat are the twin Achilles' heels of the Act. The feared economic consequences of a decision to list or to designate critical habitat[298] expose both decisions to

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[289] Other schemes protect specific species. *See, e.g.*, International Convention for the Regulation of Whaling (ICRW), Dec. 2, 1946, 62 Stat. 1716 (entered into force Nov. 10, 1948); Marine Mammal Protection Act of 1972, 16 U.S.C. §§ 1361–1421 (1994). *See generally* Japan Whaling Ass'n v. American Cetacean Soc'y, 478 U.S. 221 (1986) (interpreting the International Whaling Convention); United States v. Hayashi, 22 F.3d 859 (9th Cir. 1993) (interpreting the Marine Mammal Protection Act). Whether the Endangered Species Act applies outside the United States remains an open question. *See* Daniel A. Farber, *Stretching the Margins: The Geographic Nexus in Environmental Law*, 48 STAN. L. REV. 1247, 1251–52 (1996). *Compare* Defenders of Wildlife v. Lujan, 911 F.2d 117, 122–23 (8th Cir. 1990) (upholding extraterritorial application of the Act), *rev'd on other grounds sub nom.* Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) *with Defenders of Wildlife*, 504 U.S. at 585–89 (Stevens, J., concurring in the judgment) (refusing to apply the Act extraterritorially).

[290] 16 U.S.C. § 1532(6) (1994) (defining as "endangered" any species "which is in danger of extinction throughout all or a significant portion of its ranges").

[291] *Id.* § 1532(20) (defining as "threatened" any species "which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range").

[292] *See id.* § 1532(15) (defining the term "Secretary").

[293] *Id.* § 1533(b)(1)(A); *see also id.* § 1536(a)(2) (imposing a similar requirement for purposes of interagency consultation under § 7 of the Act). *See generally* Bob Marshall Alliance v. Hodel, 852 F.2d 1223, 1225 (9th Cir. 1988) (discussing the notion of "best available" data); Roosevelt Campobello Int'l Park Comm'n v. EPA, 684 F.2d 1041, 1052 (1st Cir. 1982) (same).

[294] *See* 16 U.S.C. § 1533(a)(1) (1994).

[295] *Id.* § 1533(a)(3)(A).

[296] *See id.* § 1533(c).

[297] *Id.* § 1533(f)(1).

[298] *See, e.g.*, Seattle Audubon Soc'y v. Moseley, 80 F.3d 1401, 1403–04 (9th Cir. 1996) (recounting the controversial history of efforts to list the northern spotted owl as an endangered species and to designate its critical habitat).

political pressure and considerable uncertainty.[299]

Section 7 requires interagency consultation and cooperation within the federal government.[300] In consultation with the Secretary, all federal agencies are required to "carry[ ] out programs for the conservation of endangered species and threatened species."[301] This provision and has been interpreted as imposing an affirmative obligation to pursue an active species conservation policy.[302] Each agency must also "insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification" of critical habitat.[303] This requirement stopped the Tellico Dam cold. As the Supreme Court said in saving the snail darter, section 7 as it then stood "admit[ted] of no exception."[304]

In response to *TVA v. Hill*, Congress established an Endangered Species Committee, popularly known as the "God Squad," with the power to grant exemptions from section 7.[305] In the first case brought before it, the God Squad unanimously refused to terminate the snail darter.[306] Although Congress ordered the dam's completion through a rider in an appropriations bill,[307] the

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[299] *See generally* Oliver A. Houck, *The Endangered Species Act and Its Implementation by the U.S. Departments of Interior and Commerce*, 64 U. COLO. L. REV. 277, 284–85, 322 (1993) (noting substantial lags in the listing of eligible species and in the designation of critical habitats for listed species).

[300] Section 6 authorizes cooperative agreements between states and the federal government to conserve species. *See* 16 U.S.C. § 1535 (1994). *See generally* A. Dan Tarlock, *Biodiversity Federalism*, 54 MD. L. REV. 1315 (1995) (noting such acts will not work unless states and the federal government cooperate).

[301] 16 U.S.C. § 1536(a)(1) (1994).

[302] *See* Carson-Truckee Water Conservancy Dist. v. Clark, 741 F.2d 257, 262 (9th Cir. 1984); Florida Key Deer v. Stickney, 864 F. Supp. 1222, 1237–38 (S.D. Fla. 1994); J.B. Ruhl, *Section 7(a)(1) of the "New" Endangered Species Act: Rediscovering and Redefining the Untapped Power of Federal Agencies' Duty to Conserve Species*, 25 ENVTL. L. 1107, 1137 (1995). *But cf.* Platte River Whooping Crane Critical Habitat Maintenance Trust v. FERC, 962 F.2d 27, 36–37 (D.C. Cir. 1992) (relieving FERC of the obligation to condition annual renewals of hydroelectric licenses on conservation measures).

[303] 16 U.S.C. § 1536(a)(2) (1994). *See generally* Thomas v. Peterson, 753 F.2d 754, 763 (9th Cir. 1985) (describing the three-step interagency consultation process).

[304] TVA v. Hill, 437 U.S. 153, 173 (1978).

[305] *See* Pub. L. No. 95-632, 92 Stat. 3752 (1978) (codified as amended at 16 U.S.C. § 1536(e)–(h) (1994)).

[306] *See* Decision of Endangered Species Committee, Jan. 23, 1979 (unreported decision).

[307] *See* Zygmunt J.B. Plater, *In the Wake of the Snail Darter: An Environmental Law Paradigm and Its Consequences*, 19 U. MICH. J.L. REF. 805, 813–14 (1986).

fish eventually prevailed: relict populations were discovered away from Tellico, and the snail darter was relisted as merely a "threatened" species.[308]

Section 9 prohibits any "person," including a governmental entity,[309] from "tak[ing]" any endangered species of fish and wildlife within the United States or on the high seas.[310] "The term 'take' means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."[311] In turn, the Secretary of the Interior has defined the term "harm" as "includ[ing] significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering."[312] The Supreme Court has upheld this expansive interpretation.[313]

There are two significant exceptions to section 9. First, even though "[t]he biological differences between animals and plants . . . offer no scientific reason for lesser protection of plants,"[314] the Act offers less protection to endangered *plants*. Section 9 prohibits removal, damage, or destruction of endangered plants only on federal lands or in knowing violation of state law.[315] The difference is substantial, for more than half of listed species are found exclusively on private land.[316] Moreover, plants—but not animals—are property merely by virtue of being present on privately owned land.[317] Second, a 1982 amendment authorizes the Secretary to permit takings that are "incidental to, and not the purpose of, the carrying out of an otherwise lawful activity."[318] As an alternative to enforcing section 9, the Secretary is authorized

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308 *See* Reclassifying the Snail Darter (*Percina Tanasi*) From an Endangered Species to a Threatened Species and Rescinding Critical Habitat Designation, 49 Fed Reg. 27,510, 27,510–14 (1984) (codified at 50 C.F.R. pt. 17).

309 *See* 16 U.S.C. § 1532(13) (1994) (defining "person").

310 *Id.* § 1538(a)(1)(B) & (C).

311 *Id.* § 1532(19).

312 50 C.F.R. § 17.3 (1998).

313 *See* Babbitt v. Sweet Home Chapter of Communities for a Great Or., 515 U.S. 687, 691 (1995).

314 NATIONAL RESEARCH COUNCIL, SCIENCE AND THE ENDANGERED SPECIES ACT 90 (1995).

315 *See* 16 U.S.C. § 1538(a)(2)(B) (1994).

316 *See* Houck, *supra* note 299, at 693.

317 *See* Holmes Rolston III, *Property Rights and Endangered Species*, 61 COLO. L. REV. 283, 293 (1990).

318 96 Stat. 1424 (1982) (codified as amended at 16 U.S.C. § 1539(a)(1)(B) (1994)); *see Sweet Home Chapter*, 515 U.S. at 700–01 (holding that the incidental take exception does not shield "deliberate action"); United States v. McKittrick, 142 F.3d 1170, 1177 (9th Cir. 1998) (same); *cf.* 16 U.S.C. § 1536(b)(4) (1994) (authorizing the Secretary to relax § 7 restrictions

under section 5 to acquire habitat for endangered and threatened species.[319]

Individual citizens play a significant role in enforcing the Endangered Species Act. Any "interested person" may petition the Secretary to determine whether a species should be listed as endangered or threatened.[320] The Act also allows "any person [to] commence a civil suit on his own behalf . . . to enjoin any person, including the United States . . . , who is alleged to be in violation of any provision" of the statute.[321] In *Lujan v. Defenders of Wildlife*,[322] however, the Supreme Court refused to interpret the citizen suit provision as granting individuals standing to force "the Executive [to] observe the [interagency consultation] procedures required by" section 7 of the Act.[323] By contrast, in *Bennett v. Spear*,[324] the Court held that citizen suits under the Endangered Species Act authorize "not only . . . actions against private violators of environmental restrictions, and not only . . . actions against the Secretary asserting underenforcement [of section 4], but also . . . actions against the Secretary asserting overenforcement" of section 4.[325]

C. *Mother Tongue*

French philosophy, as usual, is wrong. There is no genuine division between *l'homme* and *l'animal*. *Homo sapiens* shares 98.4%of its DNA with the bonobo (*Pan paniscus*).[326] The scant 1.6% in genetic distance accounts for "[o]ur important, visible distinctions from" bonobos and common chimpanzees (*Pan troglodytes*).[327] Among these differences—"upright posture, large brains, ability to speak, sparse body hair and peculiar sexual lives"— speech is by far the most diverse phenomenon.[328] Language is "a true species property," part of

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for incidental takings that are not likely to jeopardize the continued existence of a listed species); Defenders of Wildlife v. EPA, 882 F.2d 1294, 1300–01 (8th Cir. 1989).

319 *See* 16 U.S.C. § 1534 (1994).

320 *Id.* § 1533(b)(3).

321 *Id.* § 1540(g).

322 504 U.S. 555 (1992).

323 *Id.* at 573.

324 117 S. Ct. 1154 (1997).

325 *Id.* at 1163.

326 *See* JARED DIAMOND, THE THIRD CHIMPANZEE: THE EVOLUTION AND FUTURE OF THE HUMAN ANIMAL 23 (1992).

327 *Id.*

328 For an argument that peculiar sexuality should be regarded the truly distinctive behavior of "the sexiest primate alive," see DESMOND MORRIS, THE NAKED APE 63 (1967). More sophisticated research suggests, however, that we are far from being even the sexiest chimpanzees. *See* DIAMOND, *supra* note 326, at 74 (awarding that distinction to the bonobos);

the "biological endowment" unique to humans.[329] The power to speak is "an evolutionary adaptation," and "human language is a part of human biology."[330] Although "the ability to use a natural language belongs more to the study of human biology than human culture,"[331] linguistic diversity serves as perhaps the truest measure of cultural diversity. Let us unite the artificially separated realms of the human and the animal by examining the singularly human characteristic of natural speech.

Linguistic diversity is endangered, and critically so. The "loss of cultural and intellectual diversity" that occurs when "politically dominant languages and cultures simply overwhelm indigenous local languages and cultures" poses risks akin to "the dangers inherent in the loss of biological diversity."[332] When a language dies, we are left to imagine "the nature of things that have been lost and of what can be lost if linguistic and cultural diversity disappears."[333] Half the world's six thousand languages are projected to become extinct by the end of the next century.[334] The rate of loss bears a chilling resemblance to the biological forecast that "half the world's species will be extinct or on the verge of extinction" in the same time frame.[335]

RIDLEY, *supra* note 23, at 216-17 (same).

329 NOAM CHOMSKY, KNOWLEDGE OF LANGUAGE: ITS NATURE, ORIGIN, AND USE, at xxvi (1986). Chomsky, however, has denied the full Darwinian implications of this statement. *See* NOAM CHOMSKY, LANGUAGE AND MIND 97–98 (enlarged ed. 1972); NOAM CHOMSKY, LANGUAGE AND PROBLEMS OF KNOWLEDGE: THE MANAGUA LECTURES 166–67 (1988). For a detailed discussion of Chomsky's reluctance to integrate his Universal Grammar within the Darwinian intellectual framework, see DENNETT, *supra* note 68, at 384–93.

330 STEVEN PINKER, THE LANGUAGE INSTINCT: HOW THE MIND CREATES LANGUAGE 24 (1994).

331 Steven Pinker & Paul Bloom, *Natural Language and Natural Selection*, *in* THE ADAPTED MIND, *supra* note 143, at 451.

332 Ken Hale, *On Endangered Languages and the Safeguarding of Diversity*, 68 LANGUAGE 1, 1 (1992); *see also* Michael Krauss, *The World's Languages in Crisis*, 68 LANGUAGE 4, 4 (1992) ("Language endangerment is significantly comparable to—and related to—endangerment of biological species in the natural world.").

333 Ken Hale, *Language Endangerment and the Human Value of Linguistic Diversity*, 68 LANGUAGE 35, 40–41 (1992).

334 *See* Krauss, *supra* note 332, at 6; *cf.* Thomas S. O'Connor, *"We Are Part of Nature": Indigenous Peoples' Rights as a Basis for Environmental Protection in the Amazon Basin*, 5 COLO. J. INT'L ENVTL. L. & POL'Y 193, 203 (1994) (noting that this projected rate of linguistic destruction carries with it an especially steep price in lost ethnobiological knowledge). Michael Krauss has outlined a worst-case scenario in which the extinction rate projects "either the death or the doom of 90% of mankind's languages" within the next century. Krauss, *supra* note 332, at 7.

335 Jared Diamond, *World of the Living Dead*, NATURAL HIST., Sept. 1991, at 30; *cf.* WILSON, *supra* note 131, at 278 (projecting the extinction rate solely from rainforest

The United States plays an especially prominent role in this genocidal story. Most of the surviving native languages of North America hang in an especially precarious state between moribund and extinct. The linguistic component of the longstanding federal policy of "terminating" Indian sovereignty and culture formally ended only in 1990, with the passage of the Native American Languages Act.[336] Not quite a third of Native Americans today are familiar with their ancestral languages.[337] Four-fifths of the extant native languages of Canada and the United States are moribund, in the sense that they are no longer being learned by children.[338] The annual amount budgeted by the federal government to this cultural preservation project approaches $2 million—barely twice what the government devotes to saving the Florida panther.[339]

Even languages with extensive literary traditions and millions of speakers are vulnerable to the corrosive effects of American cultural hegemony. To a German critic bemoaning the onslaught of English during an age of American political, economic, and cultural ascendancy, the precarious persistence of linguistic diversity serves as the last, best defense against cultural homogenization. "Against rampant globalization, against all of these epidemics of our insane desire for unification," he says, "no warning is as piercing" as the biblical story of the Tower of Babel: "Mankind should not yearn for the uniting of all peoples, to world government, to a universal language."[340] In Europe, as

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destruction "might easily reach 20 percent by 2022 and rise as high as 50 percent or more thereafter").

[336] Pub. L. No. 101-477, 104 Stat. 1153 (1990) (codified at 25 U.S.C. § 2901 (1994)). *See generally* JACK UTTER, AMERICAN INDIANS: ANSWERS TO TODAY'S QUESTIONS 83–84 (1993) (describing the end of the federal drive to commit linguistic genocide against Native Americans); Lucille J. Watahomigie & Akira Y. Yamamoto, *Local Reactions to Perceived Language Decline*, 68 LANGUAGE 10, 15–16 (1992) (describing the events leading to passage of the Native American Languages Act).

[337] *See* CARL WALDMAN, ATLAS OF THE NORTH AMERICAN INDIAN 66–67 (1985); Mark A. Michaels, *Indigenous Ethics and Alien Laws: Native Traditions and the United States Legal System*, 66 FORDHAM L. REV. 1565, 1571 (1998).

[338] *See* Krauss, *supra* note 332, at 5 (estimating that 149 of 187 such languages are no longer being learned by children). *See generally* ETHNOLOGUE: LANGUAGES OF THE WORLD 9–55 (Barbara F. Grimes et al., 11th ed. 1988).

[339] *See* James Brooke, *Indians Striving to Save Their Languages*, N.Y. TIMES, April 12, 1998, at A1.

[340] Rolf Hochhuth, *Deutsch? Bye-bye!*, DER SPIEGEL, March 16, 1998, at 271, 275 ("Gegen die weltweit marschierende Globalisierung, gegen alle diese Epidemien unseres Einheitswahns gibt es keine eindringlichere Warnung: Wir Menschen sollten nicht zur Vereinigung aller kommen wollen, zum Einheitsstat, zur Universalsprache.") (translation from the German by the author with the kind assistance of Brigitte Frase). For a legally and

in the rest of the world, the leading culprit is the "cultural nerve gas" known as television.[341] Absent massive and effective intervention, we seem doomed to live in a dystopia where even German, like French and Polish, will be dimly remembered as "dead language[s]."[342]

Meanwhile, American public schoolrooms are magnificent laboratories of global linguistic diversity. The 1990 Census counted more than 31.8 million persons in the United States who speak one of 298 languages besides English at Home.[343] Fairfax County, Virginia, counts more than one hundred native languages in its public schools, while neighboring Alexandria boasts "the most diverse school district in America."[344]

This diversity is far from evenly distributed. In 1980, Spanish accounted for roughly half of the linguistic diversity in the United States.[345] Although a comprehensive study of language policy in the United States lies beyond the scope of this article,[346] it suffices to note that the debate over bilingual

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religiously literate exegesis of the Babel story (recounted at *Genesis* 11:1-9), see Harold J. Berman, *Law and Logos*, 44 DEPAUL L. REV. 143, 165 (1994).

[341] Krauss, *supra* note 322, at 6.

[342] ALDOUS HUXLEY, BRAVE NEW WORLD 25 (1932).

[343] *See* U.S. DEP'T OF COMMERCE, 1990 CENSUS OF POPULATION AND HOUSING, SUMMARY TAPE FILE 3C; Thomas H. Lee, Note, *A Purposeful Approach to Products Liability Warnings and Non-English-Speaking Commerce*, 47 VAND. L. REV. 1107, 1109 n.7 (1994).

[344] *See* M2 Presswire, May 14, 1998, 1998 WL 12206378 (quoting the Office of the White House Press Secretary).

[345] *See* Dorothy Waggoner, *Language Minorities in the United States in the 1980s: The Evidence from the 1980 Census*, *in* LANGUAGE DIVERSITY 79, 105 (Sandra McKay & Sau-Ling Cynthia Wong eds., 1988); Edward Sagarin & Robert J. Kelly, *Polylingualism in the United States of America: A Multitude of Tongues Amid a Monolingual Majority*, *in* LANGUAGE POLICY AND NATIONAL UNITY 20, 41 (William R. Beer & James E. Jacob eds., 1985).

[346] *See generally* Castaneda v. Pickard, 648 F.2d 989, 1008–10 (5th Cir. 1981) (outlining standards for compliance with the Bilingual Education Act of 1974, 20 U.S.C. § 880b (1994)); Valeria G. v. Wilson, 12 F. Supp. 2d 1007 (N.D. Cal. 1998) (declining to enjoin the enforcement of California Proposition 227, which abolished bilingual education programs in that state). In *Arizonans for Official English v. Arizona*, 117 S. Ct. 1055 (1995), the Supreme Court failed to address the merits of a state law declaring English the official language and forbidding official communications in any other language. For studies of various aspects of language policy in the United States, see Antonio J. Califa, *Declaring English the Official Language: Prejudice Spoken Here*, 24 HARV. C.R.-C.L. L. REV. 293 (1989); Juan F. Perea, *Demography and Distrust: An Essay on American Languages, Cultural Pluralism, and Official English*, 77 MINN. L. REV. 269 (1992); Deborah A. Ramirez, *Excluded Voices: The Disenfranchisement of Ethnic Groups From Jury Service*, 1993 WIS. L. REV. 761; Leila Sadat Wexler, *Official English, Nationalism and Linguistic Terror: A French Lesson*, 71 WASH. L. REV. 285 (1996); Frank M. Lowry, Comment, *Through the Looking Glass:*

education has turned in part on the imbalance between Spanish and other minority languages. Anecdotal evidence that children have been misplaced in programs taught in languages other than their native tongue fueled California's recent decisions to abolish bilingual education.[347] There is even one report that the San Francisco schools have been assigning black students "for disciplinary reasons to [bilingual] programs where the other language in use was Chinese."[348]

Indeed, diversity of its own force—the sheer number of languages represented in American classrooms and the rate at which that number is growing—has placed bilingual education beyond coherent design. Under *Lau v. Nichols*,[349] a school district can fulfill its Title VI obligations to children whose native language is not English in either of two ways: by teaching them enough English to mainstream them, or by teaching them in their mother tongue.[350] But in a remarkable illustration of network effects,[351] at most a few of the foreign languages represented in today's school districts can support a comprehensive bilingual program. Students speaking infrequently encountered languages *must* be mainstreamed. Yet it is jarring at the least and perhaps unlawful at the extreme to channel speakers of Spanish into a bilingual program while inserting speakers of Urdu into an English program. Each group has a colorable claim of unequal treatment. The implications for affirmative action are grim: increasing diversity, unaided by any other force, will destabilize efforts to accommodate every racial, ethnic, or cultural difference in an equitable fashion.

D. *A Final Burnt Offering*

I could extend this survey of diversity even further. Although scholars fixated on affirmative action speak as though diversity were synonymous with racial difference, other forms of diversity abound.[352] Religious diversity bears

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Linguistic Separatism and National Unity, 41 EMORY L.J. 223 (1992); Note, *"Official English": Federal Limits on Efforts to Curtail Bilingual Services in the States*, 100 HARV. L. REV. 1345 (1987).

[347] *See, e.g.*, *Toward a Common Culture*, ASIAN WALL ST. J., June 5, 1998, at 10 (describing an "African-American father in the City of Oakland, whose 5-year-old was put in a Cantonese-speaking kindergarten because the school he was required to attend offered no such class in the boy's native English").

[348] Ho v. San Francisco Unified Sch. Dist., 147 F.3d 854, 859 (9th Cir. 1998).

[349] 414 U.S. 563 (1974).

[350] *See id.* at 568-69.

[351] *See generally* Mark A. Lemley & David McGowan, *Legal Implications of Network Economic Effects*, 86 CAL. L. REV. 479 (1998).

[352] A leading version of diversity appears in immigration law. The diversity visa lottery

special mention. In many free exercise cases, a minority religion pleads for constitutional relief from a crushing legal burden. Compulsory education would annihilate the Amish;[353] education among *goyim* would harass the Hasidim into destructive assimilation.[354] For Native American religions, cemetery destruction[355] and prohibitions on peyote use[356] pose a comparable threat. In this context, religious and linguistic diversity routinely converge: "Because

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that sets aside immigrant visas for citizens of foreign countries which have been underrepresented in the American immigrant population, *see* Immigration Act of 1990, Pub. L. No. 101-649, § 203, 104 Stat. 4978, 4986 (1990) (codified at 8 U.S.C. § 1153 (1994)), embodies one of the few instances in American law in which the term "diversity" necessarily subsumes a notion of historic underrepresentation. Thanks to the twisted path of American immigration law between the patently racist "Quota Law" of 1921, Act of May 19, 1921, ch. 8, 42 Stat. 5, and the Immigration and Nationality Act Amendments of 1965, Pub. L. No. 89-236, 79 Stat. 911 (1965) (codified as amended at 8 U.S.C. §§ 1101–1503 (1994)), a vastly greater number of immigrants after 1965 came from places outside northwestern Europe—the portions of the world where the old quotas had restricted immigration. *See generally* Gabriel J. Chin, *The Civil Rights Revolution Comes to Immigration Law: A New Look at the Immigration and Nationality Act of 1965*, 75 N.C. L. REV. 273 (1996) (recounting the history of the 1965 Act as a "revolutionary" measure designed to eliminate race and national origin as selection criteria for immigrants); Richard R. Hofstetter, *Immigration Reform: Crisis and Compromise*, 5 B.C. THIRD WORLD L.J. 97, 105–06 (1985) (describing how quotas before the 1965 reform failed to match overwhelming demand outside northwestern Europe). Yet the legislative history of the 1990 Act suggests that Congress focused on the immigrant mix during the quarter century after 1965, a period during which immigration from Europe reached a historic low. *See* Walter P. Jacob, Note, *Diversity Visas: Muddled Thinking and Pork Barrel Politics*, 6 GEO. IMMIGR. L.J. 297, 301–10 (1992). The diversity visa lottery has generated a fascinating but perverse array of winners and losers. The Irish and other Europeans have been the primary beneficiaries. *See* Patricia I. Folan Sebben, *U.S. Immigration Law, Irish Immigration and Diversity:* Céad Míle Fáilte *(A Thousand Times Welcome)?*, 6 GEO. IMMIGR. L.J. 745, 746, 766–77 (1992). The primary losers are the two largest groups of immigrants since 1965, Hispanics and Asians. *See id.* at 768. Little wonder that the diversity visa program has been mocked as "affirmative action for the Irish," as a "white man's lottery," *id.* at 766, and as "a preference program . . . as unjust as any form of overt discrimination," Jacob, *supra*, at 301.

353 *See* Wisconsin v. Yoder, 406 U.S. 205 (1972).

354 *See* Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 510 U.S. 1107 (1994).

355 *See* Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988); *see also* Sarah B. Gordon, Note, *Indian Religious Freedom and Governmental Development of Public Lands*, 94 YALE L.J. 1447, 1448 (1985) ("Adherents of traditional Indian religions claim that development of certain areas threatens their religions with extinction. They fear that development will undermine the religious power of sacred sites, inhibit communication with spirits, prevent the collection of healing herbs, and even kill tribal deities.") (footnote omitted).

356 *See* Employment Div., Dep't. of Human Resources v. Smith, 494 U.S. 872 (1990).

Native religions depend on the oral tradition for their transmission, the death of a language often means the death of a religion."[357]

It is hard to imagine why religious diversity should warrant less solicitude than racial diversity.[358] Free exercise is as much a part of the Constitution as equal protection. Therein lies a deep mystery. Why does educational affirmative action put such a premium on racial diversity while paying little or no heed to underrepresented religious groups? Eugene Volokh and Timothy Hall have argued that there is no good answer to this question.[359] As far as I know, no defender of affirmative action has attempted to reply.

For my part, I believe that the answer echoes an ancient edict: "I am AFFIRMATIVE ACTION thy Law, which led you out of the racist land of America, out of the house of bondage. Thou shalt have no other gods before me."[360] For racial diversity's most fervent adherents, this is Alpha and Omega, the first and the last commandment. The American academy has no room for religious diversity, or any other sort of diversity besides the racial variant, because affirmative action is already the official religion. Just as constitutional law fancies itself as America's civic religion,[361] affirmative action has become academe's state church, complete with *Bakke* as its "sacred text," an extensive commentary by pious patriarchs and matriarchs, "an ecclesiastical hierarchy, a chronically alienated laity, and occasional holy wars."[362] "If this be heresy, make the most of it."[363]

IV. DIVERSITY BY THE NUMBERS

It's an old one about a little dirt farm girl
Who wanted to get out for good

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[357] Michaels, *supra* note 337, at 1571.

[358] *See generally* Yang, *supra* note 82 (arguing for equal judicial treatment of claims to racial and religious diversity).

[359] *See* Volokh, *supra* note 26, at 2070–76; *see also* Hall, *supra* note 211 at 585–91.

[360] *Cf. Exodus* 20:2–3 (King James) ("I *am* the LORD thy God, which have brought thee out of the land of Egypt, out of the house of bondage. Thou shalt have no other gods before me.").

[361] *See* H. JEFFERSON POWELL, THE MORAL TRADITION OF AMERICAN CONSTITUTIONALISM: A THEOLOGICAL INTERPRETATION 14 (1993) (describing "Christian theology and American constitutionalism" as structurally similar "moral traditions" that have become "rivals or competitors" for believers seeking a "rational exploration of the nature of human community and of the good life").

[362] Jim Chen, Book Review, 11 CONST. COMMENTARY 599, 602 (1994–95) (reviewing POWELL, *supra* note 361).

[363] Chen, *supra* note 161, at 1308–09 (paraphrasing Patrick Henry).

She'd do anything to keep that dream
She'd do anything she could. . . .

She just couldn't believe. . .
There was a price to pay —Blues Traveler[364]

Now that we have organized several types of diversity according to an admittedly contrived framework, let us specify the number of distinct groups—species, plant varieties, television stations, political parties, or races—in each vision of diversity. To facilitate the analysis, I shall count backwards in orders of magnitude. Call it "logarithm rolling": the inversely exponential point of view should suggest the magnitude of diversity at stake. Although numbers alone do not define diversity, this census will give us a rough basis for assessing the magnitude of diversity at issue in different contexts.

A. *Ten Degrees and Getting Colder*[365]

At the time of *TVA v. Hill*, the Supreme Court placed the best available estimate of species at roughly two million: "approximately 1.4 million full species of animals and 600,000 full species of plants."[366] More recent estimates range from five to thirty million species of living organisms.[367] One study estimates thirty million species of *insects* alone.[368] Truth be told, biologists "do not know to the nearest order of magnitude how many species exist on earth."[369] Entire swaths of biodiversity, such as the abyssal benthos of the deep sea[370] and soil bacteria,[371] elude reliable quantification. The sheer number is so

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364 BLUES TRAVELER, *Price to Pay*, *on* FOUR (A&M Records 1994).

365 NANCI GRIFFITH, *Ten Degrees and Getting Colder*, *on* OTHER VOICES, OTHER ROOMS (Electra 1993).

366 TVA v. Hill, 437 U.S. 153, 159 n.8 (1978).

367 *See* Mark A. Urbanski, *Chemical Prospecting, Biodiversity Conservation, and the Importance of International Protection of Intellectual Property Rights in Biological Materials*, 2 BUFF. J. INT'L L. 131, 133 (1995); Wilson, *supra* note 133, at 3, 5.

368 *See* Terry L. Erwin, *Tropical Forest Canopies: The Last Biotic Frontier*, 29 BULL. ENTOMOLOGICAL SOC'Y AM. 14 (1983).

369 WILSON, *supra* note 131, at 273; *see also* E.O. Wilson, *The Biological Diversity Crisis: A Challenge to Science*, 2 ISSUES SCI. TECHNOL. 20 (1985).

370 *See* J. Frederick Grassle, *Deep-Sea Benthic Biodiversity*, 41 BIOSCIENCE 464 (1991) (estimating perhaps as many as ten million species of animals on the floor of the deep sea without guessing even to an order of magnitude as to the diversity of bacteria and other microorganisms).

371 *See* Vigdis Torsvik et al., *Comparison of Phenotypic Diversity and DNA Heterogeneity in a Population of Soil Bacteria*, 56 APPLIED & ENVTL. MICROBIOLOGY 776

overwhelming that the otherwise routine enterprise of arranging species within Linnaean taxonomy "remains by force a part of modern science."[372]

Given the uncertainty over the absolute number of species on earth, "[t]here is no way to measure the absolute amount of biological diversity vanishing year by year."[373] Edward Wilson nevertheless offers what he considers "the most conservative estimate" of the current extinction rate from rainforest destruction alone: twenty-seven thousand species per year—seventy-four per day or three per hour.[374] This rate is four orders of magnitude faster than estimates of extinction rates over geological time—two species per year since the beginning of the Cambrian period 590 million years ago.[375] In the spirit of a scientific ethic that must choose between the true and the beautiful when it cannot unite the two,[376] let us expand biodiversity's orders of magnitude to a full poetic ten.[377] Ten degrees, and definitely getting colder by the minute.

B. *Four*

Of the vast number of animal species on earth, a minute proportion are

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(1990); Vigdis Torsvik, *High Diversity in DNA of Soil Bacteria*, 56 APPLIED & ENVTL. MICROBIOLOGY 776, 782 (1990) (finding roughly ten thousand species of microbes in two separate grams of sediment and offering no guess on the total degree of microbiological diversity on earth).

372 WILSON, *supra* note 258, at 137; *see also* WILSON, *supra* note 131, at 318 (estimating the effort needed to document ten million species would consume twenty-five thousand professional lifetimes); Wilson, *supra* note 133, at 14 (adding that the effort boasts "one of the lowest cost-benefit ratios of all scientific disciplines").

373 WILSON, *supra* note 131, at 280.

374 *See id.*

375 *See* David M. Raup, *Cohort Analysis of Generic Survivorship*, 4 PALEOBIOLOGY 1 (1978) (deriving from the fossil record an estimated extinction rate of 9% per million years, or roughly one species every five years in a biosphere containing two million species); David M. Raup, *Diversity Crises in the Geological Past*, *in* BIODIVERSITY, *supra* note 133, at 51, 54 (increasing the slower extinction rate by "a factor of 10" in order to account for extinct "local endemic species" not detectable by paleontologists).

376 *See Obituaries (of Hermann Weyl)*, 177 NATURE 457, 458 (1956) (quoting the physicist Hermann Weyl: "My work tried to unite the true with the beautiful; but when I had to choose one or the other, I usually chose the beautiful."), *quoted in* WILSON, *supra* note 258, at 61.

377 If we cannot safely project all ten degrees across contemporary biodiversity, the recognition that "almost all the species that ever lived are extinct," WILSON, *supra* note 131, at 216, might let us project these ten degrees across geological time. Extinction rates over the last three eras of geological time, as computed by David Raup, *see* sources cited *supra* note 375, would justify this addition of three or four orders of magnitude.

birds and mammals. The roughly forty species of domestic livestock are drawn from this sliver of terrestrial biodiversity.[378] The four thousand to five thousand surviving domestic breeds of these species, enhanced by the genes from roughly eighty species of wild relatives, "comprise the world's animal genetic resources important for food and agriculture."[379]

The plant kingdom is fairing only somewhat better. The Seed Sowers Exchange stockpiles nearly 20,000 varieties of heirloom crops, including seven varieties of apples, two hundred varieties of grapes, and 18,000 varieties of other food crops.[380] Genetic engineering and other advanced techniques of plant breeding have enhanced agriculture's biological arsenal. Between the passage of the Plant Variety Protection Act in 1970 and 1989, commercial plant breeders have received certificates for more than two thousand new varieties of sexually reproducing plants.[381] Between 1930 and 1989, the Patent and Trademark Office issued more than six thousand plant patents for asexually reproduced plants.[382]

This survey of distinct plant varieties and distinct animal breeds fails to account for plant hybrids protected solely under state laws or trade secrets and includes ornamental plants as well as plants cultivated for food, fuel, or fiber. We may nevertheless treat the resulting number of thirty or forty thousand varieties and breeds as a rough measure of the orders of magnitude of biological diversity in agriculture. That number is four. If the orders of magnitude of biodiversity in the wild are estimated at eight, there would be only half as many orders of magnitude on the farm.

The ten thousand-fold reduction in diversity bears a chilling resemblance to other ratios common in contemporary discussions of extinction. The sixty-five million years between the extinction of the dinosaurs and the present are ten

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[378] To be sure, other animals are candidates for domestication. Humanity has tamed the honeybee and the silkworm, *see* DIAMOND, *supra* note 153, at 158, and some authorities advocate the domestication of iguanas, *see* WILSON, *supra* note 131, at 294–96; WORLD WATCH LIST, *supra* note 268, at 734. This is not even to mention fish and crustaceans. But an elite group of birds and ungulate mammals remains undisputed agrarian champions after millennia of animal husbandry.

[379] WORLD WATCH LIST, *supra* note 268, at 28.

[380] Telephone Conservation with Ms. Arlyss Adelmann of Seed Sowers Exchange, Decorah, Iowa, on Oct. 29, 1998.

[381] *See* ROBERT JONDLE, *Overview and Status of Plant Property Rights*, *in* INTELLECTUAL PROPERTY RIGHTS ASSOCIATED WITH PLANTS 5, 6–7 (1989); Neil D. Hamilton, *Why Own the Farm If You Can Own the Farmer (and the Crop)?: Contract Production and Intellectual Property Protection of Grain Crops*, 73 NEB. L. REV. 48, 95 (1994).

[382] *See* JONDLE, *supra* note 381, at 7.

thousand times as long as the history of human civilization.[383] Another frightening ratio: through habitat destruction in the rainforest alone, "[h]uman activity has increased extinction" by as much as "10,000 times over [the] level" one would expect from natural selection.[384] Even ten thousand as a cardinal number has evolutionary significance: roughly ten thousand years ago, the Paleo-Indian invasion precipitated the catastrophic extirpation of much of North America's megafauna.[385]

The lesson is clear: On the farm as in the wild, human intervention dramatically reduces diversity. Modern agriculture gives a perverse twist to one of the traditional lessons learned by farm children: "things die."[386] Four orders of magnitude by four, diversity disappears.

C. *Fifty-Seven Channels (And Nothin' On)*[387]

As we cross the boundary between the natural world and the human world, we witness another dramatic decline in diversity. During any given time slot, mass media can be only as diverse as the number of channels. Until 1990 there were three national television networks. That year, in a unheralded decision that effectively reduced *Metro Broadcasting, Inc. v. FCC*[388] to "nothing more than . . . 1990's second most important legal development affecting minority programming,"[389] the FCC waived its finsyn and prime time access rules so that the newborn Fox network could combat NBC, ABC, and CBS.[390] Two smaller "emerging networks,"[391] Warner and UPN, have brought the total number to six. In a flat contradiction of the assumption that the narrowness of the electromagnetic spectrum operates as the primary constraint on the number of broadcasters,[392] the rise of new networks during the 1990s exposed how the

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383 *See* WILSON, *supra* note 258, at 122.

384 WILSON, *supra* note 131, at 280; *see also supra* note 375 and accompanying text.

385 *See* DIAMOND, *supra* note 313, at 46–47; WILSON, *supra* note 131, at 246–49.

386 Susan Machler, *People with Pipes: A Question of Euthanasia*, 16 U. PUGET SOUND L. REV. 781, 782 (1993).

387 BRUCE SPRINGSTEEN, *57 Channels (and Nothin' On)*, *on* HUMAN TOUCH (Columbia 1992).

388 497 U.S. 547 (1990).

389 Chen, *supra* note 195, at 1493 (noting that within three years of its emergence, the Fox network captured half of the ten programs most popular among black viewers); *see also* Jim Chen & Daniel J. Gifford, *Law as Industrial Policy: Economic Analysis of Law in a New Key*, 25 U. MEMPHIS L. REV. 1315, 1343–44 (1995) (same).

390 *See* Fox Broad. Co., 5 F.C.C.R. 3211 (1990).

391 *See* 47 C.F.R. § 73.662(f) (1998) (defining an "emerging network").

392 *See* Red Lion Broad. Co. v. FCC, 395 U.S. 367, 388 (1969) ("Where there are

FCC's localism policy had kept the number of viable national networks at three.[393] That number, of course, could have been and was even lower; ABC grew out of the Blue network that NBC was forced to divest during the early 1940s.[394] The Commission giveth, and the Commission taketh away.

Modern video technology alleviates the tedium somewhat. As of 1994, about 40% of the cable systems in the United States boasted a capacity of more than fifty-three channels.[395] In other words, nearly half of America's cable systems can carry the mind-numbing fifty-seven channels that became the subject of Bruce Springsteen's protest against audiovisual boredom.[396] Direct broadcast satellite, "even in its nascent state," has been offering "between 45 and 75 video channels and up to 30 music channels," with a capacity for 360 using existing data compression technology.[397]

Depending on the precise method of delivery, the audiovisual diversity found in the typical American living room ranges from slightly below ten to a number approaching one hundred. The orders of magnitude of diversity in this realm therefore range from slightly below one to slightly below two.

D. *Nuts!*

"And it's true we are immune / When fact is fiction and T.V. is reality . . . ."[398] The amount of diversity in broadcast television roughly approximates the diversity contemplated in American affirmative action programs. American law plots racial diversity on a pentagram: white, black, Asian American, Native American, and an all-embracing Hispanic category whose members may be "of any race." By comparison, more than half of the television markets in the United States "receive fewer than five commercial

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substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish."); *see also, e.g.*, Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 638 (1994) (following *Red Lion*).

393 *See* sources cited *supra* note 235.

394 *See* National Broad. Co. v. United States, 319 U.S. 190, 208 (1943); National Broad. Co. v. United States, 44 F. Supp. 688, 691 (S.D.N.Y.), *rev'd on other grounds*, 316 U.S. 447 (1942); LEONARD H. GOLDENSON & MARVIN J. WOLF, BEATING THE ODDS: THE UNTOLD STORY BEHIND THE RISE OF ABC 96–97 (1991); STERLING QUINLAN, INSIDE ABC: AMERICAN BROADCASTING COMPANY'S RISE TO POWER 20 (1979).

395 *See Turner Broad. Sys., Inc.*, 512 U.S. at 628 .

396 *See* SPRINGSTEEN, *supra* note 387.

397 Time Warner Entertainment Co. v. FCC, 105 F.3d 723, 725 (D.C. Cir. 1997) (Williams, J., dissenting from denial of rehearing en banc).

398 U2, *Sunday Bloody Sunday*, *on* WAR (Island Records 1983).

broadcast channels (including UHF channels), and only twenty percent receive seven or more."[399] Race in America, like broadcast television, boasts something less than a single order of magnitude of diversity. The snack bowl supplies what may be the starkest measure of the boredom in both realms. The typical jar of mixed nuts (peanuts, cashews, almonds, walnuts, filberts, and Brazil nuts) offers as much excitement as Free TV (NBC, ABC, CBS, Fox, Warner, UPN) and more variety than the EEOC.[400] Adding macadamia nuts or pistachios might make the thrill too big to bear.

Of course, it could be worse. Most cases designed to preserve political diversity contemplate no more than two choices. Even the highly oligopolistic long-distance telephone market immediately after the Bell breakup—AT&T, MCI, and Sprint—offered a broader spectrum of options.[401] Although the Supreme Court has frowned upon state laws that "favor[ ] two particular parties—the Republicans and the Democrats—and in effect . . . give them a complete monopoly,"[402] the better part of the Court's jurisprudence suggests that there is such a thing as too much political diversity. In voting as in broadcast regulation, the government enjoys substantial leeway in channeling the "cacophony of competing voices, none of which [can] be clearly and predictably heard"[403] into a very limited number of officially sanctioned pathways. To the extent state laws give "legal force to the internal nominating rules of" the Democratic and Republican Parties, they "raise the cost of

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399 *Time Warner*, 105 F.3d at 725 (Williams, J., dissenting from denial of rehearing en banc).

400 So *that's* why "[they] want [their] MTV." DIRE STRAITS, *Money for Nothing*, *on* BROTHERS IN ARMS (WEA/Warner Bros. 1985).

401 *See* PAUL W. MACAVOY, THE FAILURE OF ANTITRUST AND REGULATION TO ESTABLISH COMPETITION IN LONG-DISTANCE TELEPHONE SERVICES 64 (1996). The modified final judgment that broke up the Bell system was rendered in *United States v. American Tel. & Tel. Co.*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd mem. sub nom.* Maryland v. United States, 460 U.S. 1001 (1983). *See generally* Jim Chen, *The Legal Process and Political Economy of Telecommunications Reform*, 97 COLUM. L. REV. 835, 850–59 (1997) (describing the path of telecommunications law between the Bell breakup and the Telecommunication Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.)).

402 Williams v. Rhodes, 393 U.S. 23, 32 (1968); *see also* Anderson v. Celebrezze, 460 U.S. 780, 805–06 (1983) (rejecting "political stability" as a basis for a law that imposed an unreasonably early filing deadline on independent candidates).

403 Red Lion Broad. Co. v. FCC, 395 U.S. 367, 376 (1969) (footnote omitted); *cf.* Ashbacker Radio Corp. v. FCC, 326 U.S. 327, 332–33 (1945) (noting that awarding a broadcast license necessarily precludes another applicant's proposal to broadcast on the identical or nearby frequencies).

defecting from the two major parties."[404] In cases permitting states to restrict primaries to registered party members,[405] to ban write-in votes[406] and fusion tickets,[407] and to exclude minor party candidates from debates,[408] the Justices have generally adhered to the maxim, "third parties need not apply."[409] Justice Scalia, in particular, has defended the old-fashioned spoils system as a bulwark of the *two*-party system.[410] Although additional parties can supply a powerful check on the two dominant parties,[411] the relevant cases give states ample room to restrict the factional habitat of political parties in the name of preventing voter confusion, "voter intimidation[,] . . . election fraud," and the like.[412] Such "[s]tability-enhancing regulation" is merely a tool by which "state legislatures (comprised exclusively of Democrats and Republicans) . . . create practically unchangeable two-party oligopolies."[413]

That politics should reduce diversity so dramatically should come as no

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[404] Issacharoff & Pildes, *supra* note 182, at 668 (describing the ballot access provisions at issue in *Morse v. Republican Party*, 517 U.S. 186 (1996)).

[405] *See* Storer v. Brown, 415 U.S. 724, 731–34 (1974); Rosario v. Rockefeller, 410 U.S. 752, 761–62 (1973). *But cf.* Tashijian v. Republican Party, 479 U.S. 208, 225 (1986) (allowing a party to permit independents to vote in its primary notwithstanding state law to the contrary).

[406] *See* Burdick v. Takushi, 504 U.S. 428, 439–40 & n.9 (1992) (upholding a ban on write-in voting as a measure for combating factionalism and fraud, preventing "party raiding," "enforcing nominating requirements," and "'fostering informed and educated expressions of the popular will'").

[407] *See* Timmons v. Twin Cities Area New Party, 117 S. Ct. 1364, 1367 (1997).

[408] *See* Arkansas Educ. Television Comm'n v. Forbes, 118 S. Ct. 1633, 1644 (1998) (upholding a decision to exclude an independent candidate for Congress from a televised debate because the candidate "had generated no appreciable public interest").

[409] *See* Bradley A. Smith, Note, *Judicial Protection of Ballot Access Rights: Third Parties Need Not Apply*, 28 HARV. J. ON LEGIS. 167 (1991) (arguing that much of the state ballot-access legislation is unconstitutional and that the Supreme Court has failed to recognize this unconstitutionality).

[410] *See* Rutan v. Republican Party, 497 U.S. 62, 92 (1990) (Scalia, J., dissenting); *cf.* Bush v. Vera, 517 U.S. 952, 959 (1996) (assuming without deciding that the protection of incumbents can be a legitimate interest in redistricting decisions); Shaw v. Reno, 509 U.S. 630, 673 & n.10 (1993) (White, J., dissenting) (same).

[411] *See* Issacharoff & Pildes, *supra* note 182, at 681–83; *cf.* MAURICE DUVERGER, POLITICAL PARTIES: THEIR ORIGIN AND ACTIVITY IN THE MODERN STATE 216–18 (Barbara North & Robert North trans., 1954) (describing the two-party system as the byproduct of simple majority and single-member districting rules).

[412] Burson v. Freeman, 504 U.S. 191, 206 (1992) (upholding a law prohibiting the solicitation of votes and the display or distribution of campaign materials within 100 feet of a polling place).

[413] Issacharoff & Pildes, *supra* note 182, at 686.

surprise. Let us again treat the six thousand extant human languages as a rough measure of human cultural diversity. Even if four-fifths of these languages disappear during our lifetimes, the linguistic diversity that remained would still span three orders of magnitude. By contrast, there are only 185 nation-states belonging to the United Nations.[414] The nation-state as a form of political organization, thought in modern times to facilitate the self-determination of peoples,[415] falls short of capturing human linguistic diversity by a full order of magnitude.

When race and politics intersect, diversity diminishes even further. Even though pleas to expand the traditional two-race paradigm have become a staple of Asian-American[416] and Hispanic[417] legal scholarship, the Supreme Court's voting rights cases are stuck in a binary analytical mode. *Thornburg v. Gingles*,[418] the leading case interpreting section 2 of the reinvigorated Voting Rights Act, speaks exclusively in terms of a single majority race and a single minority race.[419]

The Court can barely envision, much less resolve, a voting rights case involving more than two racial blocs. In *United Jewish Organizations of Williamsburgh, Inc. v. Carey*,[420] the Court could not and did not distinguish the voting interests of Hasidic Jews—the epitome of a discrete and insular minority—from those of other whites. More recently, a federal district court practically choked on the famously incompatible claims of black and Hispanic

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414 *See* United Nations, *United Nations Member States* (visited Oct. 29, 1998) <http://www.un.org/overview/unmember.html>.

415 *See, e.g.*, Woodrow Wilson, The Fourteen Points, Address of the President Before a Joint Meeting of the Senate and House (Jan. 8, 1918) *in* 56 CONG. REC. 690–91 (1918). *See generally* Mark Movsesian, *The Persistent Nation-State and the Foreign Sovereign Immunities Act*, 18 CARDOZO L. REV. 1083, 1084–94 (1996) ("sketch[ing]" a "broad outline" of the history of the nation-state).

416 *See, e.g.*, Viet D. Dinh, *Race, Crime, and the Law*, 111 HARV. L. REV. 1289, 1290 (1998) (book review); Lance T. Izumi, *Confounding the Paradigm: Asian Americans and Race Preferences*, 11 NOTRE DAME J.L. ETHICS & PUB. POL'Y 121, 129–30 (1997); Frank H. Wu, *Neither Black Nor White: Asian Americans and Affirmative Action*, 15 B.C. THIRD WORLD L.J. 225 (1995).

417 *See, e.g.*, Deborah Ramirez, *Multicultural Empowerment: It's Not Just Black and White Anymore*, 47 STAN. L. REV. 957 (1995) (arguing that the increased racial and ethnic diversity in America requires a new approach to race-conscious remedies).

418 478 U.S. 30 (1986).

419 *See id.* at 50–51 (recognizing a § 2 vote dilution claim where "the minority group" is "sufficiently large," "geographically compact," and "politically cohesive" to amass a winning "majority in a single-member district" but can be and often is defeated by bloc voting by the "white majority").

420 430 U.S. 144 (1977).

voters in Florida.[421] Faced with what it considered "two independent, viable Section 2 claims," the court declined to add either an additional black district or an additional Hispanic district.[422] The Supreme Court ultimately dodged the competing claims by holding that neither group's circumstances could "support a finding of vote dilution."[423] One of the ill-starred districts in *Bush v. Vera*[424] "squiggle[d]" and "spurt[ed]" multiple "wings, or fingers" in order "to enclose black voters, while excluding nearby Hispanic residents."[425]

These cases shed a sobering light on the soul of diversity under racialism.[426] Especially when more than one racial bloc is involved, "racial gerrymandering in [the] vote dilution cases" is merely "a slightly less precise mechanism than the racial register for allocating representation on the basis of race."[427] The redistricting game vividly illustrates the zero-sum game that any affirmative action scheme ultimately becomes. In politics, after all, "[s]ome candidate, along with his supporters, always loses."[428] There is an even larger but simpler lesson. Race, being a purely political phenomenon, takes on no more diversity than its immediate political context permits.

E. *(Absolute) Zero*

It can get worse. When diversity diminishes to zero orders of magnitude, it disappears altogether. It becomes a single, lonely point.[429] In educational affirmative action, this is precisely what has happened. This logarithmic tour of diversity by the numbers ends at zero.

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421 *See* DeGrandy v. Wetherell, 815 F. Supp. 1550, 1577 (N.D. Fla. 1992), *aff'd in part, rev'd in part sub nom.* Johnson v. DeGrandy, 512 U.S. 997 (1994).

422 *DeGrandy v. Wetherell,* 815 F. Supp. at 1577.

423 *Johnson v. Degrandy*, 512 U.S. at 1024.

424 517 U.S. 952 (1996).

425 *Id.* at 973–74 (quoting Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After* Shaw v. Reno, 92 MICH. L. REV. 483, 556 (1993)).

426 *Cf.* OSCAR WILDE, THE SOUL OF MAN UNDER SOCIALISM (auth. ed. 1910).

427 Holder v. Hall, 512 U.S. 874, 908 (1994) (Thomas, J., concurring in the judgment).

428 United Jewish Org. of Williamsburgh, Inc. v. Carey, 430 U.S. 144, 166 (1977).

429 *See* EDWIN ABBOTT, FLATLAND: A ROMANCE OF MANY DIMENSIONS 93 (6th ed., Dover Publications 1952) (1884) (describing "the realm of Pointland, the Abyss of No Dimensions," as "the lowest depth of existence"). *See generally* Timothy P. Terrell, *Flatlaw: An Essay on the Dimensions of Legal Reasoning and the Development of Fundamental Normative Principles*, 72 CAL. L. REV. 288, 289 (1984) (using *Flatland*'s depiction of a two-dimensional world as an extended metaphor "for describing and assessing the related mental exercise of legal reasoning").

"Nothing in the Constitution supports the notion that individuals may be asked to suffer otherwise impermissible burdens in order to enhance the societal standing of their ethnic groups."[430] In the two decades since *Bakke*, however, the academy's "celebration of diversity" consists principally of an unyielding "demand for conformity."[431] Although minority students and scholars "have fewer degrees of freedom than their white counterparts," affirmative action's enforcers systematically demand and often exact tribute in honor of race-conscious admissions and hiring.[432] Multiculturalism, the philosophy underlying diversity-based affirmative action, has arguably become the ascendant ideology in American education today.[433] The faction that was "principally responsible for the Civil Rights Revolution" divided bitterly over whether to adopt or to oppose race-based affirmative action.[434] Having conquered the academy, affirmative action's proponents are proceeding to hound the dissidents. Too often a commitment to diversity means rude behavior toward critics of official race-consciousness, especially if those unfortunate victims are nonwhite.[435] In large portions of the black community, it is no longer possible to contemplate a "genuinely black" person who expresses opposition to or even skepticism toward affirmative action, no more than we can speak of a feminist against abortion rights.[436] There is no other way to explain the abuse directed at individuals as diverse as Clarence Thomas, Randall Kennedy, Keith and Maria Hylton, and Ward Connerly.[437] At a more subtle level, survey the ranks of law school deans, even of faculty appointments committees. You will find few, if any, outspoken critics of affirmative action.

The persecution of those accused of crimes against diversity has inflicted

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[430] Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 298 (1978) (opinion of Powell, J.).

[431] Arthur Schelsinger, Jr., Annual Doctoral Commencement, City University of New York 8 (1994), *quoted in* NEIL HAMILTON, ZEALOTRY AND ACADEMIC FREEDOM: A LEGAL AND HISTORICAL PERSPECTIVE 64 (1995) (internal quotation marks omitted).

[432] Chen, *supra* note 10, at 1904.

[433] *See* NATHAN GLAZER, WE ARE ALL MULTICULTURALISTS NOW 4 (1995) ("[M]ulticulturalism in education . . . has, in a word, won.").

[434] Randall Kennedy, *Persuasion and Distrust: A Comment on the Affirmative Action Debate*, 99 HARV. L. REV. 1327, 1327–28 (1986).

[435] *See* STEPHEN L. CARTER, REFLECTIONS OF AN AFFIRMATIVE ACTION BABY 103 (1993); DANIEL A. FARBER & SUZANNA SHERRY, BEYOND ALL REASON: THE RADICAL ASSAULT ON TRUTH IN AMERICAN LAW 78–84 (1997).

[436] *See* Deborah Malamud, *Values, Symbols and Facts in the Affirmative Action Debate*, 95 MICH. L. REV. 1668, 1713 (1997).

[437] *See* Chen, *supra* note 10, at 1904–05.

deep, abiding harm on higher education.[438] Such is the "mischief [that] lies in using race . . . as a proxy for intellectual diversity."[439] So much for academic freedom as "a special concern of the First Amendment."[440] How especially sad it is to recall the age when controversy was the very heart of free speech.[441] By the waters of Babylon we wept, when we remembered Zion.[442]

"Some say the world will end in fire / Some say in ice."[443] From the "chilling effect"[444] to the Supreme Court's "darkest, most despondent" depictions of "fire and suffocation,"[445] the predominant image of censorship in free speech jurisprudence waivers between ice and fire. Ray Bradbury's science fiction classic *Fahrenheit 451* clearly favors fire.[446] For my part, I prefer a temperature besides the kindling point of paper. "[I]ce, I think," would suffice.[447] Absolute zero, zero degrees Kelvin, is surely the temperature of hell.[448] It likewise represents the loss of diversity in our survey of endangered

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438 *Cf.* Daniel A. Farber, *Reinventing Brandeis: Legal Pragmatism for the Twenty-First Century*, 1995 U. ILL. L. REV. 163, 189 (suggesting that treating "ethnic jokes" as "the ultimate problem facing minority students within universities" gives short shrift to vastly more pressing concerns such as "the extremely high attrition rates for some groups of minority students" and "the right to engage in frank and controversial discussion of racial issues").

439 Michael S. Paulsen, *Reverse Discrimination and Law School Faculty Hiring: The Undiscovered Opinion*, 71 TEX. L. REV. 993, 1000 (1993).

440 Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967); *accord* Regents of the Univ. of Mich. v. Ewing, 474 U.S. 214, 226 (1985); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 312–13 (1978) (opinion of Powell, J.). *See generally* J. Peter Byrne, *Academic Freedom: A "Special Concern of the First Amendment,"* 99 YALE L.J. 251 (1989) (analyzing the roles of the Constitution and the courts in protecting academic freedom).

441 *See* Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 547 (1980); *cf., e.g.*, Terminello v. City of Chicago, 337 U.S. 1, 4 (1949) ("A function of free speech . . . is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.").

442 *See Psalms* 137:1.

443 ROBERT FROST, *Fire and Ice*, *in* COMPLETE POEMS OF ROBERT FROST 268, 268 (1949).

444 As penance for reciting this most hackneyed of legalisms, I shall cite Richard Posner's concise catalogue of "cliches" of the judicial vocabulary. *See* Richard A. Posner, *The Meaning of Judicial Self-Restraint*, 59 IND. L.J. 1, 1 & n.2 (1984).

445 Jim Chen, *Rock 'n' Roll Law School*, 12 CONST. COMMENTARY 315, 320 (1995).

446 RAY BRADBURY, FAHRENHEIT 451 (1953).

447 FROST, *supra* note 443, at 268.

448 *See* DANTE ALIGHIERI, THE INFERNO OF DANTE, canto XXXIV, *ll.* 48–58, at 367 (Robert Pinsky trans., Farrer, Strauss & Giroux 1994), *quoted in* Chen, *supra* note 10, at 1845 n.42.

species and university admissions. The death of diversity in the race-conscious university is the true "inexorable zero" at issue in affirmative action.[449]

From the natural world to the university, the blinding speed at which diversity has disappeared helps explain the mind-numbing nature of this debate. Any university, or even education at large, is merely an "island of minute dimensions[,] desperately isolated . . . and simpler and less diverse by [degrees] of magnitude than the environment in which" we naturally operate.[450] "The tedium in such a reduced world" is unavoidably "oppressive for highly trained people aware of the grandeur of the original biosphere."[451] Deliver us.

V. THE TOOLBOX OF THE GODS

I will twine and will mingle my waving black hair
With the roses so red and the lilies so fair
The myrtle so green of an emerald hue
The pale emanita and violets of blue. . . .

Oh, he taught me to love him, he called me his flower
A blossom to cheer him through life's weary hour
But now he has gone and left me alone
The wild flowers to weep and the wild birds to moan. . . .

I'll dance and I'll sing and my life shall be gay
I'll banish this weeping, drive troubles away
I'll live yet to see him regret this dark hour
When he won and neglected his frail wildwood flower.[452]

Aldo Leopold began his *Sand County Almanac* with a famous division of humanity: "There are some who can live without wild things, and some who cannot."[453] He was wrong. None of us can live without wild things. Insects, the lone class of animals targeted by an exclusion from the Endangered Species Act,[454] are so essential to life on earth that if they "and other land-dwelling

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449 *See* cases cited *supra* note 70.

450 WILSON, *supra* note 258, at 117.

451 *Id.*

452 JOAN BAEZ, *Wildwood Flower*, *on* JOAN BAEZ (Vanguard 1960) (delivering a stirring version of this traditional folk song).

453 ALDO LEOPOLD, A SAND COUNTY ALMANAC AND SKETCHES HERE AND THERE, at vii (1949).

454 *See* 16 U.S.C. § 1532(6) (1994) (excluding from "[t]he term 'endangered species' . . . a species of the Class Insecta determined . . . to constitute a pest whose protection . . . would present an overwhelming and overriding risk to man").

anthropods . . . were to disappear, humanity probably could not last more than a few months."[455] "Most of the amphibians, reptiles, birds, and mammals," along with "the bulk of the flowering plants and . . . the physical structure of most forests and other terrestrial habitats" would disappear in turn.[456] The world of higher organisms would, as it did at the end of the Permian period, have "an extremely close brush with total destruction."[457] "The land would return to" something resembling its Cambrian condition, "covered by mats of recumbent wind-pollinated vegetation, sprinkled with clumps of small trees and bushes here and there, largely devoid of animal life."[458]

This fable of a world without insects illustrates the most extreme example of ecological services provided by nonhuman species.[459] The honeybee, its compatriots in the class *Insecta*, and every other species is a "magic well": the more you draw, the deeper it gets.[460] After surveying the many values advanced by biological diversity and the conservation of endangered species, this part explores the values putatively served by racial and ethnic diversity in higher education. As this article's opening comparison of *Bakke* with *TVA v. Hill* suggests, there are strong parallels between educational affirmative action and the Endangered Species Act. A close examination of those connections—and of the two legal schemes' significant differences—will bring us far closer to a mature understanding of that decisive legal term, "diversity."

A. *The Treasure of the Tierra Madre*

The Endangered Species Act explicitly acknowledges the "esthetic, ecological, educational, historical, recreational, and scientific value" of endangered species and the biodiversity they represent.[461] Allied bodies of international law confirm this view:[462] global biological diversity is part of the

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[455] WILSON, *supra* note 131, at 133.

[456] *Id.*

[457] Raup, *Diversity Crises in the Geological Past*, *supra* note 375, at 52.

[458] WILSON, *supra* note 131, at 133.

[459] *See* Edward O. Wilson, *The Little Things That Run the World*, 1 CONSERVATION BIOLOGY 344 (1987).

[460] *Compare* WILSON, *supra* note 258, at 17 (recounting how the "great German zoologist Karl von Frisch" described "his favorite organism . . . the honeybee" as "a magic well") *with id.* at 19 ("Every species is a magic well.").

[461] 16 U.S.C. § 1531(a)(3) (1994).

[462] *See* Convention on International Trade in Endangered Species of Wild Fauna and Flora, *done* Mar. 3, 1973, 27 U.S.T. 1087 (entered into force July 1, 1975); Convention on Biological Diversity, U.N. Conference on Environment and Development, *done* June 5, 1992, 31 I.L.M. 818 (entered into force Dec. 29, 1993).

commonly owned heritage of all humanity and accordingly deserves full legal protection.[463] The values of biodiversity fall into three overlapping categories: commodities, ecological services, and aesthetics.

1. *Demeter's Dominion*

First, many species are phenotypical or genotypical natural resources. In the quaint language of Commerce Clause jurisprudence, the species themselves are "instrumentalities of interstate commerce."[464] American courts and commentators have often noted the value of wild species as a supply of food.[465] A world that is steadily losing its food security[466] might expand the storehouse of twenty plant species that supply nine-tenths of humanity's food supply.[467] "Waiting in the wings are tens of thousands of unused plant species, many demonstrably superior to those in favor."[468] As genetic warehouses, many plants are enhancing the productivity of crops already in use. In the United States alone, the genes of wild plants have accounted for much of "the explosive growth in farm production since the 1930s."[469] The contribution is worth $1 billion each year.[470]

Moving from nature's farm to nature's pharmacy, we see even more dramatic gains.[471] Aspirin and penicillin—our star analgesic and antibiotic—had humble origins in the meadowsweet plant and in cheese mold.[472] Leeches,

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[463] *See* Christopher D. Stone, *What to Do About Biodiversity: Property Rights, Public Goods, and the Earth's Biological Riches*, 68 S. CAL. L. REV. 577, 591–92 (1995).

[464] United States v. Lopez, 514 U.S. 549, 558 (1995).

[465] *See* Missouri v. Holland, 252 U.S. 416, 435 (1920); WILLIAM T. HORNADAY, OUR VANISHING WILD LIFE: ITS EXTERMINATION AND PRESERVATION 236–43 (1913); WILLIAM T. HORNADAY, WILD LIFE CONSERVATION IN THEORY AND PRACTICE 103–10 (1914).

[466] *See* Luther Tweeten, *Dodging a Malthusian Bullet in the 21st Century*, 14 AGRIBUSINESS 15 (1998).

[467] *See* WILSON, *supra* note 131, at 287.

[468] *Id.* at 289; *see also id.* at 287 (reporting that 30,000 plant species are known to have edible parts and that seven thousand of these have been grown or collected for food at some point in human history).

[469] National Ass'n of Home Builders v. Babbitt, 130 F.3d 1041, 1053 (D.C. Cir. 1997) (opinion of Wald, J.), *cert. denied*, 118 S. Ct. 2340 (1998).

[470] *See Endangered Species Act: Oversight Hearing Before the Task Force on Endangered Species Act of the Comm. on Resources, House of Representatives*, 104th Cong. 190 (1995).

[471] *See generally Medicinal Uses of Plants; Protection for Plants Under the Endangered Species Act: Hearing Before the Subcomm. on Environment and Natural Resources of the House Comm. on Merchant Marine and Fisheries*, 103d Cong. (1993).

[472] On aspirin, see WILSON, *supra* note 131, at 283. On penicillin, see *Home Builders*,

vampire bats, and pit vipers save more hearts in the emergency room than they stop in cinemas. These three species all contribute anticoagulant drugs that reduce blood pressure, prevent heart attacks, and facilitate skin transplants.[473] The Costa Rican government is working together with Merck & Co., the multinational pharmaceutical company, to assay that country's rich biota.[474] A single commercially viable product derived "from, say, any one species among the twelve thousand plants and 300,000 insects estimated to live in . . . [Costa Rica] could handsomely repay Merck's entire investment" of $1 million in 1991 dollars.[475] Gene splicing and other techniques for biological engineering at the molecular level have opened the entire natural world's storehouse of genetic wealth to human exploitation.

This evaluation of species as commodities and genetic warehouses is surely understated. We have yet to account for option value, or the wealth that future generations would transfer to the present in order to preserve an endangered species for future exploitation.[476] Nor have we attempted to assess the even more elusive value placed by individuals who expect never to use a species directly but nevertheless would be willing to pay to ensure the species' "existence."[477] Which species saved from unthinking development will be the next perennial maize?[478] Absent aggressive legal intervention, what species will lie silent in Grey's Country Graveyard?[479] Who will recount the stories interred

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130 F.3d at 1053 n.13; BIODIVERSITY II: UNDERSTANDING AND PROTECTING OUR BIOLOGICAL RESOURCES 9 (Marjorie L. Reaka-Kudla et al. eds., 1997).

473 *See* WILSON, *supra* note 131, at 285–86; BIODIVERSITY II, *supra* note 472, at 9.

474 *See generally* Michael D. Coughlin, Jr., Recent Development, *Using the Merck-INBio Agreement to Clarify the Convention on Biological Diversity*, 31 COLUM. J. TRANSNAT'L L. 337, 356–72 (1993) (suggesting the use of a private agreement between Merck Pharmaceuticals and the government of Costa Rica as a practical approach to resolving the contested issues of the Convention on Biological Diversity).

475 WILSON, *supra* note 131, at 321.

476 *See generally* DAVID W. PEARCE & R. KERRY TURNER, ECONOMICS OF NATURAL RESOURCES AND THE ENVIRONMENT 148–53 (1990); Daniel A. Farber & Paul A. Hemmersbaugh, *The Shadow of the Future: Discount Rates, Later Generations, and the Environment*, 46 VAND. L. REV. 267 (1993).

477 *See generally* Howard F. Chang, *An Economic Analysis of Trade Measures to Protect the Global Environment*, 83 GEO. L.J. 2131 (1995) (distinguishing this form of "contingent valuation" from the standard measure of option value).

478 *See* Hugh H. Iltis et al., *Zea diploperennis (Gramineae): A New Teosinte from Mexico*, 203 SCIENCE 186 (1979) (reporting the discovery of a wild relative of domestic corn, unique among maizes in growing perennially, on a few acres of land that were a week away from being cleared for subsistence agriculture).

479 *Cf.* WILSON, *supra* note 131, at 244.

with their tellers along the banks of the Spoon River?[480] Silence, unbroken.

2. *Gaia and Her Retinue*

As the fable of a world without insects illustrates, animals, plants, and microorganisms provide ecological services.[481] The Supreme Court has lauded the pesticidal talents of migratory birds.[482] Numerous organisms process the air we breathe, the water we drink, the ground on which we walk.[483] Other species serve as sentries. Just as canaries warned coal miners of lethal gases, the decline or disappearance of indicator species provides an early warning system against deeper environmental threats.[484] When frogs sprout extra limbs, develop genital deformities, or disappear altogether, they sound a piercing environmental alarm.[485]

Still other organisms serve as keystone species.[486] These species play such a central role in their ecosystem that their extirpation leads to a total imbalance in other species, either extinction or unprecedented abundance.[487] Remove sea otters from the Pacific coast, and sea urchins will strip the sea floor of its biologically diverse kelp beds.[488] By keeping rodent populations in check, jaguars and pumas serve as the *de facto* managers of the rainforest, thereby contending strongly for the title of "the big things that run the world."[489]

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[480] *See* EDGAR LEE MASTERS, SPOON RIVER ANTHOLOGY (John E. Hallwas ed., Univ. of Ill. Press 1992) (1915).

[481] *See generally* PAUL EHRLICH & ANNE EHRLICH, EXTINCTION 86–95 (1981).

[482] *See* Missouri v. Holland, 252 U.S. 416, 431 (1919).

[483] *See* CHARLES C. MANN & MARK L. PLUMMER, NOAH'S CHOICE: THE FUTURE OF ENDANGERED SPECIES 123 (1995); John Copeland Nagle, *Playing Noah*, 82 MINN. L. REV. 1171, 1210 (1998).

[484] *See* Oliver A. Houck, *Why Do We Protect Endangered Species, and What Does That Say About Whether Restrictions on Private Property to Protect Them Constitute "Takings"?*, 80 IOWA L. REV. 297, 301 & n.20 (1995).

[485] *See* Kim A. McDonald, *Sharp Decline of Amphibians Alarms Biologists Worldwide*, CHRON. HIGHER EDUC., July 24, 1998, at A11.

[486] *See* Oregon Natural Resources Council, Inc. v. Kantor, 99 F.3d 334, 339 (9th Cir. 1996); Ruhl, *supra* note 139, at 591.

[487] *See generally* WILSON, *supra* note 131, at 164–72; Peter B. Landres et al., *Ecological Uses of Vertebrate Indicator Species: A Critique*, 2 CONSERVATION BIOLOGY 316 (1988).

[488] *See* David O. Duggins, *Kelp Beds and Sea Otters: An Experimental Approach*, 61 ECOLOGY 447 (1980).

[489] John Terborgh, *The Big Things That Run the World—A Sequel to E.O. Wilson*, 2 CONSERVATION BIOLOGY 402 (1988); *cf.* Norman Owen-Smith, *Megafaunal Extinctions: The Conservation Message from 11,000 Years B.P.*, 3 CONSERVATION BIOLOGY 405 (1989)

The conservation of nonhuman organisms yields an amenity that is arguably even more important: ecosystem protection. By protecting discrete species, we indirectly protect the ecosystems—and all the species that live in them.[490] Some larger tropical animals may not carry great utilitarian value in themselves, but the human urge to protect these charismatic "flagship species" helps protect the rainforest at large.[491] The bald eagle has served this function in the country that has adopted it as the national symbol.[492] Indeed, to save any species, we must protect the ecosystems in which they live.[493]

3. *Persephone Is the Mother of the Muses*

The true aesthete shuns the very thought of placing a value on beauty.[494] "'Beauty is truth, truth beauty,'—that is all / Ye know on earth, and all ye need to know."[495] Defenders of biodiversity nevertheless can and do measure the "tangible economic value" of the pleasure derived from "visiting, photographing, painting, and just looking at wildlife."[496] The U.S. Fish and Wildlife Service placed the economic impact in 1991 of wildlife observation and feeding at $18.1 billion in consumer spending, $3 billion in tax revenues, and 766,000 jobs.[497] Failure to protect threatened and endangered species

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(offering as contestants the elephants, rhinoceroses, and other large herbivores that effectively manage the African savanna).

[490] *See* J.B. Ruhl, *Thinking of Environmental Law as a Complex Adaptive System: How to Clean Up the Environment by Making a Mess of Environmental Law*, 34 HOUS. L. REV. 933, 972 (1997).

[491] *See* Paul R. Ehrlich & Edward O. Wilson, *Biodiversity Studies: Science and Policy*, 253 SCIENCE 758, 760 (1991); *cf.* Alan Randall, *Human Preferences, Economics and the Preservation of Species*, *in* THE PRESERVATION OF SPECIES: THE VALUE OF BIOLOGICAL DIVERSITY 79, 87–88 (Bryan G. Norton ed., 1986) (noting and criticizing the human preference for species with utilitarian value, legendary or patriotic significance, or some intangible appeal to the human sense of beauty).

[492] *See* Donell R. Grubbs, *Of Spotted Owls and Bald Eagles: Raptor Conservation Soars into the '90s*, 19 CAP. U. L. REV. 451, 480–81 (1990).

[493] *See, e.g.*, Myrl L. Duncan, *Property as a Public Soliloquy: A Role for Intellectual and Legal History in Takings Analysis*, 26 ENVTL. L. 1095, 1129 (1996).

[494] *See, e.g.*, OSCAR WILDE, THE PICTURE OF DORIAN GRAY 4 (Donald L. Lawler ed., W.W. Norton & Co. 1988) (1891) ("All art is quite useless.").

[495] JOHN KEATS, *Ode on a Grecian Urn*, *in* THE COMPLETE POEMS 344, 346 (John Barnard ed., 1973).

[496] Nagle, *supra* note 483, at 1209.

[497] *See* JAMES D. CAUDILL, U.S. FISH & WILDLIFE SERV., 1991 ECONOMIC IMPACTS OF NONCONSUMPTIVE WILDLIFE-RELATED RECREATION 6–7 (1997); *see also* Nagle, *supra* note 483, at 1209–10 (distinguishing between amounts spent on wildlife observation in general and

might even reduce traffic among "amateur students of nature or professional scientists who . . . [travel] to observe and study these species . . . ."[498] On a global scale, ecotourism gives tropical countries, home to most of the world's species, a viable alternative to subsistence agriculture and other destructive means of sustenance. Costa Rican rainforests preserved for ecotourism "have become many times more profitable per hectare than land cleared for pastures and fields," while the endangered gorilla has turned ecotourism into "the third most important source of income in Rwanda."[499]

But what of the species that lack any agricultural or pharmaceutical value, that are so short of charisma that humans are unlikely to value them for aesthetic reasons or to lobby for their protection? In light of the debate over whether Endangered Species Act enforcement should more consciously account for costs and benefits,[500] the fate of seemingly useless and ugly creatures looms large. To put it bluntly, most species languish on the margins of our historical, recreational, and scientific balance sheets.[501] "The vast majority of endangered species probably will not cure cancer."[502] For these forgotten species, the greatest hope lies in biophilia itself, the inborn human affinity for life and living things.

"Human" culture means nothing without bestial "nature." Consider the fundamental problem of *Paradise Lost*. How could John Milton possibly "hope

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on the observation of endangered species in particular).

[498] Palila v. Hawaii Dep't of Land & Natural Resources, 471 F. Supp. 985, 995 (D. Haw. 1979), *aff'd*, 639 F.2d 495 (9th Cir. 1981); *accord* United States v. Bramble, 103 F.3d 1475, 1481 (9th Cir. 1996). *But cf.* Lujan v. Defenders of Wildlife, 504 U.S. 555, 566–67 (1992) (rejecting the "animal nexus" and "vocational nexus" theories of standing to enforce the Endangered Species Act, which would grant standing to "anyone who observes or works with an endangered species, anywhere in the world").

[499] WILSON, *supra* note 131, at 305 ("As Rwanda protects the gorilla, the gorilla will help to save Rwanda.").

[500] *Compare, e.g.*, MANN & PLUMMER, *supra* note 483 (arguing against protecting every species) *with, e.g.*, Nagle, *supra* note 483 (acknowledging the impossibility of rescuing every species but positing a legal and moral obligation to try). *See generally* Martin L. Weitzman, *On Diversity*, 107 Q.J. ECON. 363 (1992) (arguing that perfect species conservation is not economically feasible). In a world of finite resources, ranking among species is unavoidable. Even Edward O. Wilson, perhaps the world's leading advocate of biodiversity protection, has his favorite. *See* WILSON, *supra* note 258, at 128 (arguing that "[a]mong the perhaps thirty million species of organisms on Earth," the bonobo "deserves the highest priority in research and preservation" on account of its extremely close kinship to humans).

[501] *See, e.g.*, Houck, *supra* note 484, at 298; Plater, *supra* note 307, at 851.

[502] Zygmunt J.B. Plater, *The Embattled Social Utilities of the Endangered Species Act—A Noah Presumption and Caution Against Putting Gasmasks on the Canaries in the Coalmine*, 27 ENVTL. L. 845, 853 (1997).

to express Creation's heart at the dawn of time"?[503] He accomplished this literary stunt by summoning "the innate pleasure from living abundance and diversity":[504]

> *Not that fair field*
> *Of Enna, where Prosperin gathering flowers,*
> *Herself a fairer flower, by gloomy Dis*
> *Was gathered, which cost Ceres all that pain*
> *To seek her through the world, nor that sweet grove*
> *Of Daphne, by Orontes and the inspired*
> *Castalian spring, might with this Paradise*
> *Of Eden strive.*[505]

In these "eight lines of astonishing symphonic power," Milton "shadows beauty with a hint of tragedy, giving us the untrammeled and fertile world awaiting corruption."[506] Belinda Carlisle expressed a similar sentiment in a succinct but far less sublime fashion: "Heaven is a place on earth."[507] From the heights of blank verse to the depths of bland pop, utilitarian questions "dissolve into a study of aesthetics and morals."[508] Ethics and religion stem ultimately from the relation of humans with their natural surroundings.[509]

We as a species have no meaning except by reference to our natural history. What T.S. Eliot said of tradition and the individual talent applies with equal force to nature and the selfish gene:[510] "No poet, no artist of any art, has his complete meaning alone. His significance, his appreciation is the appreciation of his relation to the dead poets and artists. You cannot value him alone; you must set him, for contrast and comparison, among the dead."[511] Only by tracing "feeling and myth. . . . back through time past cultural history to the evolutionary origins of human nature"[512] can we grasp a hint of the

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503 WILSON, *supra* note 67, at 212.

504 *Id.*

505 JOHN MILTON, PARADISE LOST, book IV, *ll.*268–75 (1674).

506 WILSON, *supra* note 67, at 212.

507 BELINDA CARLISLE, *Heaven Is a Place on Earth*, *on* HEAVEN ON EARTH (UNI/MCA 1987).

508 R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 43 (1960).

509 *See generally* WILSON, *supra* note 67, at 238–65.

510 *See generally* RICHARD DAWKINS, THE SELFISH GENE (1976) (describing the gene's drive to reproduce and perpetuate itself as the prime mover in evolution).

511 T.S. ELIOT, *Tradition and the Individual Talent*, *in* THE SACRED WOOD 92, 49 (1928).

512 WILSON, *supra* note 258, at 55.

"beauty and mystery that seized us at the beginning," of "[e]very contour of the terrain, every plant and animal living in it, and the human intellect that masters them all."[513]

B. *Law Is a Many-Splendored Thing*

Like biodiversity protected by the Endangered Species Act, the diversity achieved through educational affirmative action reputedly confers rich benefits. "Just as diversity in the gene pool, in the variability of life on earth, is necessary for our survival, so is cultural diversity a great pool from which we draw ideas and practices . . . to live by."[514] At the individual level, each student belonging to an otherwise underrepresented group brings his or her experience as an outsider in a white-dominated society.[515] At an extreme, critical race theorists assert that every nonwhite student and scholar speaks and writes in a distinctive "voice of color."[516] More modestly, other advocates argue that a student's "background and life experience will . . . be vital components" of that "student's potential to teach other students."[517] To the extent that "experiences, outlooks, and ideas correlate in some measure with . . . race," such a use of racial or ethnic identity as a "proxy for . . . intellectual diversity" may be considered the *epistemological* benefit of diversity-based affirmative action.[518]

A second benefit inheres in the *interaction* fostered by the infusion of nonwhites into traditionally white-dominated universities.[519] Mixing for its own sake "ensur[es] that students and teachers encounter individuals with experiences, backgrounds, and cultures different from their own."[520] At its best, diversity promotes genuine self-governance: it "teach[es] students how to be sovereign, responsible, and informed citizens in a heterogeneous

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513 WILSON, *supra* note 67, at 237.

514 Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 YALE L.J. 1329, 1401 (1991).

515 *See* Paul Brest & Miranda Oshige, *Affirmative Action for Whom?*, 47 STAN. L. REV. 855, 863-64 (1995).

516 *See* Alex M. Johnson, Jr., *The New Voice of Color*, 100 YALE L.J. 2007 (1991).

517 Amar & Katyal, *supra* note 3, at 1774.

518 Volokh, *supra* note 26, at 2059. *But see* Kirk A. Kennedy, *Race-Exclusive Scholarships: Constitutional* Vel Non, 30 WAKE FOREST L. REV. 759, 775 (1995) (doubting the validity of race as a proxy for viewpoints and outlooks).

519 *See* Brest & Oshige, *supra* note 515, at 862-63.

520 Chen, *supra* note 10, at 1881; *see also* HOWARD R. BOWEN, INVESTMENT IN LEARNING: THE INDIVIDUAL AND SOCIAL VALUE OF AMERICAN HIGHER EDUCATION 13 (1977).

democracy."[521]

This interactive strategy is extremely vulnerable to a deeply rooted, perhaps intractable phenomenon: race-consciousness on campus is at war with itself. No interaction will take place if the university's race-based strategy engenders voluntary residential segregation and other forms of racial separatism.[522] Unless the racially tinted view of the world is expunged altogether, increased racial diversity of its own accord may not increase interracial understanding. "[M]inority group members replicate the majority's view of all racial minorities except their own."[523] Moreover, at least on the terms and conditions established by academia's multiculturalist ruling class, affirmative action scarcely permits, much less encourages, cultural fertilization across racial or ethnic lines. Defenders of the diversity rationale question whether admitting the son of "a fourth-generation Irish father . . . and a Salvadoran immigrant mother" who "relates [more] easily with the Anglo side of the family" would "serve any of the goals of affirmative action."[524] To take another example, a founder of Critical Race Theory has found it odd, even objectionable, for a person of Asian descent who has assimilated into the American mainstream to "claim[ ] . . . the historical heritage of African Americans as his own."[525] By this reasoning, the Underground Railroad, Martin Luther King, Jr., and Langston Hughes belong to some sort of exclusive enclave within the American tradition, untouchable except by other blacks.[526]

A third benefit ascribed to racial diversity further complicates the picture. By swiftly increasing minority numbers, affirmative action putatively raises the comfort level for many nonwhites.[527] This crude application of network

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[521] Amar & Katyal, *supra* note 3, at 1774; *see also* ALEXANDER W. ASTIN, WHAT MATTERS IN COLLEGE? FOUR CRITICAL YEARS REVISITED 431 (1993) (reporting "self-reported gains in cognitive and affective development (especially increased cultural awareness)" and "increased commitment to promoting racial understanding").

[522] *See* Amar & Katyal, *supra* note 3, at 1778.

[523] Sheri Lynn Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1611, 1698 (1985).

[524] Brest & Oshige, *supra* note 515, at 875. Not to belabor the point, but I once again "must note, if only in passing, the deep irony of equating 'Irish' with 'Anglo.'" Chen, *supra* note 21, at 1138 n.101.

[525] Gotanda, *supra* note 155, at 1594.

[526] *See id.* at 1594–95.

[527] *See, e.g.*, Brest & Oshige, *supra* note 515, at 865 (noting that minority faculty members "often provide important counsel, support, and comfort for minority students—especially, but not only, when events occur that seem to threaten their sense of acceptance at the institution"); Deborah C. Malamud, *Affirmative Action, Diversity, and the Black Middle Class*, 68 U. COLO. L. REV. 939, 954 (1997) (speculating that "a school or employer might decide that members of minority groups will only feel comfortable if they have safety in

theory's first premise—that a consumer's utility increases as other consumers buy the same good[528]—may raise more questions than it answers. To treat the notion of comforting minority students as a benefit of diversity conflates diversity with the distinct and doctrinally unsound role model rationale.[529]

On the other hand, if "comfort" is simply shorthand for the claim that affirmative action should increase minority representation above token numbers, it might be defended on the grounds that a "critical mass of students of a particular group" will enhance this group's visibility on campus and, critically, enhance "diversity *within* the group."[530] In sufficient numbers, members of a favored group might develop enough diversity among themselves that they and other students learn "one of the most important lessons" in American education: "That the diverse ethnic, cultural, and national backgrounds . . . in our famous 'melting pot' do not identify essential differences among the human beings that inhabit our land."[531] On the other hand, this assimilationist vision contradicts the epistemological justification for enhancing racial diversity.[532]

Suffice it to say that the benefits delivered by educational affirmative action fall far short of the clarity and magnitude of the benefits delivered by biodiversity conservation. A fuller understanding of the differences between these two types of diversity, however, depends on a systematic comparison of the legal mechanisms at issue. I now turn to that task.

C. *Diversity and Its Doppelgänger*

In many respects, affirmative action strongly resembles the Endangered Species Act. Both legal schemes rest on a notion of "diversity." Striking similarities in remedies and rationales link the two bodies of law. Even more remarkably, concepts developed in the context of species conservation and affirmative action also appear in the law governing competition in markets for goods and markets for ideas. But there are also differences. Though subtle, these differences are significant enough to undermine the claim that affirmative

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numbers, and that, therefore, minorities must be overrepresented if they are to feel comfortable enough to fully deliver the benefits of diversification . . . .").

[528] *See* Philip H. Dybvig & Chester S. Spatt, *Adoption Externalities as Public Goods*, 20 J. PUB. ECON. 231, 231–32 (1983); Michael L. Katz & Carl Shapiro, *Network Externalities, Competition, and Compatibility*, 75 AM. ECON. REV. 424, 424 (1985); Lemley & McGowan, *supra* note 351, at 483.

[529] *See* Chen, *supra* note 10, at 1881–82.

[530] Amar & Katyal, *supra* note 3, at 1777.

[531] Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 315 (1986) (Stevens, J., dissenting).

[532] *See* Chen, *supra* note 10, at 1882.

action after *Bakke* is genuinely motivated by an interest in diversity.

1. *For Every Right There Is a Remedy*

At the broadest level of generality, both species conservation and affirmative action address predation, parasitism, competition, and habitat destruction. All of these natural activities and their human analogues threaten diversity. Overt discrimination is the equivalent of senseless hunting; hate speech is comparable to firing a harpoon in anger at protected marine mammals.[533] And just as protecting discrete animals or species leads to the protection of the ecosystem, preferential admission of individual students shelters the entire educational system from race-based subordination. Indeed, the entire rhetoric of antitrust and economic regulation rests on similar metaphors of predatory pricing and rate discrimination.[534] Moreover, although federal judges routinely protest that the law protects "*competition*, not *competitors*,"[535] American antitrust policy often adopts this very strategy of indirectly protecting competition as a process by directly protecting discrete, identifiable competitors on the verge of economic extinction.[536]

The similarities become even stronger when one considers primary legal duties and remedies. Both species conservation and affirmative action draw sharp distinctions between public-sector and private-sector conduct. Section 7 of the Endangered Species Act targets the federal government; its requirement of interagency consultation,[537] as illustrated in *TVA v. Hill*,[538] can crush the most lavishly funded federal project. By contrast, section 9's prohibition on unlawful "takings" of endangered species applies to any "person," especially private property owners. As I have already outlined,[539] section 9 is weaker than section 7 in two significant respects.[540]

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533 *Cf.* United States v. Hayashi, 22 F.3d 859 (9th Cir. 1993) (holding that a defendant who utilized gun-fire to scare porpoises away from the daily catch did not violate the Marine Mammal Protection Act).

534 *See* Chen & Gifford, *supra* note 389, at 1327–33.

535 Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962); *accord, e.g.*, Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 337–39 (1990); Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 458 (1993).

536 *See* Robert H. Lande, *Wealth Transfer as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 67, 104 (1982).

537 *See supra* notes 300–304 and accompanying text.

538 437 U.S. 153 (1978).

539 *See supra* notes 309–319 and accompanying text.

540 First, whereas § 7 protects both threatened and endangered species, § 9 applies only to endangered species. Second, § 9 confers less protection on endangered plants than on

The law of affirmative action likewise boasts a cascading hierarchy of legal obligations based on the governmental, publicly funded, or purely private nature of the actor in question. The sequence from the Equal Protection Clause to Title VI to Title VII—or, if you prefer, from *Bakke*, *Croson*, and *Adarand* to *Guardians* to *Weber*—can be summarized simply: The more "private" the actor, the greater its freedom to pursue affirmative action on its own. Under the Equal Protection Clause, the federal government and the states may pursue only those race-conscious strategies that are narrowly tailored to achieving a compelling interest.[541] Title VI, which bans discrimination, exclusion from participation, or denial of benefits "on the ground of race, color, or national origin" in "any program or activity receiving Federal financial assistance,"[542] has been interpreted as applying constraints equivalent to those under the Equal Protection Clause to federally subsidized private schools.[543] On the other hand, Department of Education regulations implementing Title VI purport to permit some forms of voluntary affirmative action.[544] To the extent that Congress passed Title VI under its spending power,[545] federally funded entities may not have received the extraordinary level of notice needed before they can incur

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endangered animals. Section 7 lacks that taxonomic distinction.

[541] *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 492–93, 505 (1989); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 299 (1978).

[542] 42 U.S.C. § 2000d (1994).

[543] *See* United States v. Fordice, 505 U.S. 717, 732 n.7 (1992); Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582, 610–11 (1983) (Powell, J., concurring in the judgment); *id.* at 612–13 (O'Connor, J., concurring in the judgment); *id.* at 639–42 (Stevens, J., dissenting); Fullilove v. Klutznick, 448 U.S. 448, 492 n.77 (1980) (plurality opinion of Burger, C.J.); *id.* at 517 n.15 (Powell, J., concurring); *id.* at 517 n.1 (Marshall, J., concurring in the judgment); *Bakke*, 438 U.S. at 287 (opinion of Powell, J.) ("Title VI must be held to proscribe only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment."); *id.* at 328 (Brennan, White, Marshall, and Blackmun, JJ., concurring in the judgment in part and dissenting in part) ("Title VI prohibits only those uses of racial criteria that would violate the Fourteenth Amendment if employed by a State or its agencies . . . .").

[544] *See* 34 C.F.R. § 100.3(b)(6)(ii) (1997); Washington Legal Found. v. Alexander, 984 F.2d 483, 484–85, 488 (D.C. Cir. 1993); Coalition for Econ. Equity v. Wilson, 946 F. Supp. 1480, 1518 (N.D. Cal. 1996).

[545] *See* Sandoval v. Hagan, 7 F. Supp. 2d 1234, 1268–69 (M.D. Ala. 1998) (characterizing Title VI as an exercise of the spending power and as an exercise of Congress's power to enforce the Fourteenth Amendment); Bryant v. New Jersey Dep't of Transp., 1 F. Supp. 2d 426, 434–35 (D.N.J. 1998) (same); *cf.* United States v. Yonkers Bd. of Educ., 893 F.2d 498, 503 (2d Cir. 1990) (describing Title VI as a statute enforcing the Fourteenth Amendment without addressing whether Congress also relied on its spending power).

liability under this statute.[546] Finally, the received wisdom is that private employers may freely adopt race-based affirmative action programs.[547]

The Endangered Species Act and federal discrimination law alike support theories of liability for "environmental" misconduct that harms a protected group's interests without injuring any single identifiable victim. The Supreme Court has sustained the Interior Department's application of section 9 of the Endangered Species Act to habitat destruction.[548] The obvious analogue in discrimination law is *Vinson v. Meritor Savings Bank*,[549] which recognized a Title VII cause of action for sexual harassment when an employer creates a "hostile work environment."[550] In two recent cases, public universities in Texas and Maryland have tried unsuccessfully to defend race-conscious admissions and financial aid as responses to racially hostile campus environments.[551]

Both bodies of law contemplate—and disfavor—the extreme remedy of a set-aside. Section 5 of the Endangered Species Act authorizes the United States to acquire habitat for endangered and threatened species.[552] To avoid such an expensive conservation strategy, the Secretary of the Interior may instead invoke section 9's restrictions on private land use.[553] Similarly, although *Bakke* frowned upon the use of quotas rather than reliance on putatively flexible "plus factors," the Supreme Court has not hesitated to uphold set-asides and other quantitative measures that respond to clear instances of institutional discrimination.[554] The presence of comparable harsh remedies in communications law—the new rule on educational programming for children[555]

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546 *See* Davis v. Monroe County Bd. of Educ., 120 F.3d 1390, 1399–1401, 1406 (11th Cir. 1997), *cert. granted*, 66 U.S.L.W. 3387 (Sept. 29, 1998) (No. 97-843); Samuel Issacharoff, *Can Affirmative Action Be Defended?*, 59 OHIO ST. L.J., 669, 673 n.11 (1998). *But see* Doe v. University of Illinois, 138 F.3d 653, 662–63 (7th Cir. 1998) (rejecting *Davis*).

547 *See* United Steelworkers of Am. v. Weber, 443 U.S. 193, 208–09 (1979).

548 *See* Babbitt v. Sweet Home Chapter of Communities for a Great Or., 515 U.S. 687 (1995).

549 477 U.S. 57 (1986).

550 *See id.* at 73.

551 *See* Hopwood v. Texas, 78 F.3d 932, 953 (5th Cir.), *cert. denied*, 518 U.S. 1033 (1996); Podberesky v. Kirwan, 38 F.3d 147, 152–57 (4th Cir. 1994), *cert. denied*, 514 U.S. 1128 (1995).

552 *See* 16 U.S.C. § 1534 (1994).

553 *See Sweet Home Chapter*, 515 U.S. at 702–03 (acknowledging that purchases of habitat under § 5 "may well cost the government less in many circumstances than pursuing civil or criminal penalties" under § 9).

554 *See, e.g.*, United States v. Paradise, 480 U.S. 149, 185–86 (1987).

555 *See* Children's Television, 61 Fed. Reg. 43,981 (Aug. 27, 1996).

and cable television's "must-carry" rule[556]—completes the picture. Given sufficient room to stretch the level of generality, we can extend the analogy to laws requiring regulated utilities to offer interconnection and unbundled access to their competitors.[557] If the sort of diversity at stake is fragile and compelling enough, a commensurate remedy within the bounds of the law's imagination will clear out the necessary living space.

From this perspective, what affirmative action advocates want is academic *Lebensraum* for historically disadvantaged groups. The question is not one of ability but one of resources and will. Both species protection and affirmative action inspire harsh rhetoric about the costs of diversity and the distribution of those costs. The debate invariably becomes hotter as the perceived costs rise.

Consider first the reactions to more aggressive applications of the Endangered Species Act. In objecting to the extension of section 9's prohibition against "tak[ing]" species, Justice Scalia complained that habitat preservation "on private lands imposes unfairness to the point of financial ruin—not just upon the rich, but upon the simplest farmer who finds his land conscripted to national zoological use."[558]

The alternative to an expansive application of section 9, of course, is publicly financed land acquisition under section 5 of the Act. Justice Scalia's rhetoric and logic unmistakably reflect those of the Takings Clause, which is unquestionably "'designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'"[559]

What Justice Scalia merely intimated, Justice White explicitly stated in a notorious dissent from denial of *certiorari* in another Endangered Species Act case. A $2,500 fine under the Act for shooting an endangered grizzly bear that threatened domesticated sheep, Justice White reasoned, might serve as "the constitutional equivalent of an edict taking [the sheep] in the first place."[560] In light of such judicial sentiments, we can readily understand (albeit

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[556] *See* Turner Broad. Sys., Inc. v. FCC, 117 S. Ct. 1174 (1997); Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622 (1994).

[557] *See, e.g.*, American Paper Inst., Inc. v. American Elec. Power Serv. Corp., 461 U.S. 402 (1983); Iowa Utils. Bd. v. FCC, 120 F.3d 753 (8th Cir. 1997), *cert. granted*, 118 S. Ct. 879 (1998). *See generally* Jim Chen, *TELRIC in Turmoil, Telecommunications in Transition: A Note on the* Iowa Utilities Board *Litigation*, 33 WAKE FOREST L. REV. 51 (1998) (describing and assessing regulatory schemes of this sort).

[558] *Sweet Home Chapter*, 515 U.S. 687, 714 (1995) (Scalia, J., dissenting).

[559] First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 318–19 (1987) (quoting Armstrong v. United States, 364 U.S. 40, 49 (1960)).

[560] Christy v. Lujan, 490 U.S. 1114, 1116 (1989) (White, J., dissenting from denial of cert.).

unsympathetically) why Congress would intervene in endangered species listings and critical habitat determinations.[561] Everyone loves diversity, but no one wants to pay for it.

It is hard to imagine a simpler summary of the affirmative action debate. Every argument, pro or con, can be restated as a cry that affirmative action, or failure to engage in it, inflicts unacceptable costs. Stressing unfairness to innocent victims is tantamount to complaining about costs borne by displaced whites or, in certain circumstances, Asian Americans. To argue that affirmative action stigmatizes its beneficiaries is to object to the costs borne by the marginally less capable members of these groups.

2. *Adaptive Radiation*

Though they proceed on similar premises, species conservation and affirmative action differ quite dramatically. The fundamental unit in biodiversity, of course, is the species. The vexing problem of geographically separated subspecies aside, nature dictates the definition of a species: a species is a population or series of populations of organisms that freely interbreed with one another in natural conditions.[562] Over time each species becomes "a closed gene pool, an assemblage of organisms that does not exchange genes with other species[,] . . . . evolves diagnostic hereditary trains[,] and comes to occupy a unique geographic range."[563] So bound are individuals by the need to reproduce sexually within this genetic community that the species as a whole should be regarded as an individual in its own right.[564] Endangered Species Act controversies over the definition of a species[565] reflect the political economy of decisions under section 4 to list a species as threatened or endangered, which in turn triggers burdensome legal obligations under sections 7 and 9.

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561 *See, e.g.*, Environmental Defense Ctr. v. Babbitt, 73 F.3d 867, 872 (9th Cir. 1995) (holding that a rider prohibiting the expenditure of money to make final species listings or critical habitat determinations entitled the Secretary of the Interior to postpone the listing of the California red-legged frog "until a reasonable time after appropriated funds are made available").

562 WILSON, *supra* note 131, at 405; *see id.* at 38 (defining the "'biological-species concept'": "*a species is a population whose members are able to interbreed freely under natural conditions*"). *See generally* MAYR, *supra* note 134, at 477–525.

563 WILSON, *supra* note 131, at 42.

564 *See* Ghiselin, *supra* note 134, at 269–72.

565 *See, e.g.*, Endangered Species Comm. v. Babbitt, 852 F. Supp. 32 (D.D.C. 1994) (ordering the delisting of the California gnatcatcher because the author of the scientific report used by the Fish and Wildlife Service refused to release the data to construction industry consultants, in violation of the Administrative Procedure Act). *See generally* Michael Taylor, *Biological Uncertainty in the Endangered Species Act*, 8 NAT. RES. & ENV'T 6 (1993).

By contrast, race as the basic unit of affirmative action has no biological basis. Its definition has shifted over American history.[566] Its very fluidity—the fact that members of different races can and do freely interbreed—holds the key to affirmative action's destiny. The Asian and Hispanic categories have been cobbled out of politically convenient alliances of culturally diverse ethnic groups, and the Census Bureau has narrowly repelled a corrosive effort to introduce an all-embracing "multiracial" category. Because I have more to say about this subject, I shall defer an extended, detailed discussion. For the moment, it suffices to notice that no natural barriers forestall a comprehensive redefinition or even the complete disposal of the legal construct called race.[567]

Legal protection of diversity begins only when someone sounds the alarm of scarcity. It should come as no surprise that the entire body of federal mass communications law rests on what is now recognized as a spurious assumption that the electromagnetic spectrum is incurably "scarce." But types of scarcity differ dramatically. In conventional broadcasting, scarcity is a purely temporal constraint. No number of abusively boring signals can cut the atmosphere's capacity for radio waves. The scarcity of black and Hispanic students in Texas's and California's public universities is blamed on an unfortunate confluence of factors and events—the much maligned use of standardized tests, coupled with ill-timed judicial, administrative, or political decisions. No one genuinely believes that this shortfall will be permanent; the real debate concerns the nature, extent, and timing of the universities' legally permissible responses. And the spectacular example of Hebrew in the twentieth century shows that even dead languages can be revived.[568]

Not so with natural extinction. Extirpated species never return. The diversity of species living and lost is matched only by the number of ways in which humans speed their destruction. Hunting is perhaps the least of these. The introduction of exotic competitors and predators, chemical pollution, or the extirpation of a keystone species all play significant roles. Most prominent of all is habitat destruction,[569] which often has the perverse effect of removing

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[566] *See generally* LOPEZ, *supra* note 142, at 3–9 (pointing out that early assignments of race "implied that races exist as physical fact" while current reliance on common knowledge "demonstrates that racial taxonomies devolve upon social demarcations").

[567] *Cf.* Chen, *supra* note 21, at 1163 ("As a strictly sociopolitical phenomenon lacking any basis in biology, race lives and dies by law. It deserves to die.") (footnotes omitted).

[568] *See* PINKER, *supra* note 330, at 260.

[569] *See, e.g.*, Paul R. Ehrlich, *The Loss of Diversity: Causes and Consequences*, *in* BIODIVERSITY, *supra* note 133, at 21; *cf.* Larry E. Morse et al., *Native Vascular Plants*, *in* OUR LIVING RESOURCES: REPORT TO THE NATION ON THE DISTRIBUTION, ABUNDANCE, AND HEALTH OF U.S. PLANTS, ANIMALS, AND ECOSYSTEMS 205, 208 (1995) (describing "[h]abitat alteration and incompatible land use" as larger threats to endangered plants in the United

dominant species.[570] The extreme form of habitat destruction is a Centinelan holocaust, so named for the conversion of a diverse forest ridge in Ecuador into a cacao plantation.[571] There is far greater urgency and far less room for error in species conservation than in any other scheme for preserving diversity.

The permanent nature of lost biodiversity profoundly affects the baseline from which the Endangered Species Act begins and the normative goal that it can hope to accomplish. Except perhaps the most hopeless of critical race theorists, all of us dare to imagine a world after racism.[572] By contrast, there is no way to remove the massive human footprint on terrestrial biology. We have inflicted deep damage that cannot be fixed within any temporal frame of reference shy of geological time. At most we can try to reintroduce some species to their former ranges and hope that the transplantation will take.

Finally, the most intriguing way in which biological diversity differs from its human analogues may be the role of numbers. Ecology and evolutionary biology abound with mathematically significant thresholds and concepts. The sheer number of species may contribute to an ecosystem's long-run vitality.[573] The 50-500 rule of genetic health posits that a species needs an effective population of at least fifty to survive short-term threats, but at least five hundred to ensure that genetic drift can offset the long-term genetic deterioration caused by inbreeding.[574] Equitability, or rough proportionality in abundance among species, is another important quantitative concept.[575] Even if an ecosystem has a large number of species—say, a thousand—it is less diverse than another ecosystem containing the same number of species, but with roughly the same number of individuals in each species. The latter ecosystem, by virtue of its

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States than over-collecting, global climate change, and sea-level rise).

[570] *See* David Tilman et al., *Habitat Destruction and the Extinction Debt*, 371 NATURE 65 (1994).

[571] *See* Calaway Dodson & Alwyn H. Gentry, *Biological Extinction in Western Ecuador*, 78 ANNALS MO. BOTANICAL GARDENS 273 (1991); *see also* WILSON, *supra* note 131, at 243 (arguing that the name of the ridge, Centinela, "deserves to be synonymous with the silent hemorrhaging of biological diversity").

[572] *But see* DERRICK BELL, FACES AT THE BOTTOM OF THE WELL (1992); MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1990S, at 5 (2d ed. 1994); *cf.* T. Alexander Aleinikoff, *A Case for Race-Consciousness*, 91 COLUM. L. REV. 1060, 1062 (1991) (arguing that positive race-conscious attitudes should not wither away).

[573] *See* Yvonne Baskin, *Ecologists Dare to Ask: How Much Does Diversity Matter?*, 264 SCIENCE 202 (1994).

[574] *See* sources cited *supra* note 132.

[575] *See* ANNE E. MAGURRAN, ECOLOGICAL DIVERSITY AND ITS MEASUREMENT (1988); WILSON, *supra* note 131, at 151–52.

greater equitability, is more diverse.

These notions of critical mass and proportionality find their analogues in affirmative action. Few if any major universities are completely devoid of students from each of America's five recognized racial groups. The real complaint is that certain groups, usually blacks and Hispanics, are underrepresented. Thus, a university might argue that it needs a "critical mass of students of a particular group so that other students become aware of the group" and—perhaps just as importantly—so that "diversity *within* the group" will have a chance to blossom.[576]

On the other hand, there is reason to dread an excessively enthusiastic application of the equitability concept in higher education. As the last generation of Asian Americans has discovered, proportional representation in admissions justifies caps as readily as it does floors.[577] The Supreme Court has already rejected enhancement theory, which is the First Amendment version of the equitability concept. "[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment."[578] It is a short step thence, especially in field so intimately connected to free speech, to rejecting or at least curbing the notions of equitability and proportionality in educational affirmative

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[576] Amar & Katyal, *supra* note 3, at 1777.

[577] *See, e.g.*, United Jewish Orgs. v. Carey, 430 U.S. 144, 172–73 (1977) (Brennan, J., concurring in part and concurring in the judgment) (describing how "a purportedly preferential race assignment may in fact disguise a policy that perpetuates disadvantageous treatment of the plan's supposed beneficiaries"); Ho v. San Francisco Unified Sch. Dist., 147 F.3d 854, 857 (9th Cir. 1998) (describing a school district's 40% cap on students belonging to "any [single] racial/ethnic group" at any one school); Wessmann v. Boston Sch. Comm., 996 F. Supp. 120, 132 n.9 (D. Mass. 1998) (noting that a diversity-driven, race-based public school admissions program "resulted in the non-admission of two Hispanic student applicants who had higher composite scores than a white student applicant who was admitted"); Jerry Kang, *Negative Action Against Asian Americans: The Internal Instability of Dworkin's Defense of Affirmative Action*, 31 HARV. C.R.-C.L. L. REV. 1, 43 (1996) (noting how contemporary academic practice "asks Asian Americans to bear a greater burden than Americans of European descent to further the interest of decreasing racial prejudice"); Frank H. Wu, *Neither Black Nor White: Asian Americans and Affirmative Action*, 15 B.C. THIRD WORLD L.J. 225, 278 (1995) (noting how subtle caps on Asian-American university enrollment are defended as benign, diversity-enhancing transfers "from Asian Americans . . . to African Americans"); *cf.* Arizona v. Maricopa County Med. Soc'y, 457 U.S. 332, 348 (1982) (arguing that a nominal price cap, putatively beneficial to consumers, might in fact operate as a welfare-destroying scheme to fix minimum prices).

[578] Buckley v. Valeo, 424 U.S. 1, 48–49 (1976) (per curiam); *see also* L.A. Powe, Jr., *Mass Speech and the Newer First Amendment*, 1982 SUP. CT. REV. 243, 269 (characterizing enhancement theory as "wildly at odds with the normal First Amendment belief that more speech is better").

action.

Especially in California, the hue and cry over the loss of "diversity" after the end of affirmative action overlooks a crucial racial dynamic. The abolition of racial preferences has increased rather than decreased Asian-American access to that state's public universities. Seen in this light, the whole project reeks of a wildlife management plan for controlling "exotics." Have students of Asian ancestry become the equivalent of Eurasian milfoil in the Great Lakes, an unwanted exotic with no natural enemies (*i.e.*, whites) whose success in the new environment crowds out more desirable native species (*i.e.*, the blacks and Hispanics who preceded Asians in immigration and political participation)? Or is Asian success on the so-called quantitative measures of academic preparedness the equivalent of unchecked predation by the Nile perch?[579]

VI. THE DESCENT OF LAW

We shall not cease from exploration
And the end of all our exploring
Will be to arrive where we started
And know the place for the first time. —T.S. Eliot[580]

Having surveyed other legal schemes for protecting diversity, I shall now proceed to level six distinct but interrelated objections to diversity as an affirmative action rationale. First, far from enhancing expressive diversity, affirmative action has transmogrified itself into a corrupt form of educational patronage and graft. Second, the palpable gap in credentials between specially and ordinarily admitted students has converted affirmative action into an engine of group libel. Third, affirmative action acts as a catalyst for resentment and incivility. Fourth, the obsession with racial balance at all levels of education has blinded administrators to stronger, more reliable indicia of intellectual diversity. Fifth, the affirmative action debate has drained precious attention and energy from far more pressing issues. Sixth and finally, in what may be the most profound lesson that biological diversity can teach its educational imposter, the inherent unity of the human genome spells doom for affirmative action. The static classification of humans into distinct racial categories will not long endure

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[579] *See* Christopher G. Barlow & Allan Lisle, *Biology of the Nile Perch* Lates niloticus *(Pisces: Centropomidae) with Reference to Its Proposed Role as a Sport Fish in Australia*, 39 BIOLOGICAL CONSERVATION 269 (1987); Daniel J. Miller, *Introductions and Extinction of Fish in the African Great Lakes*, 4 TRENDS IN ECOLOGY & EVOLUTION 56 (1989). *See generally* TIJS GOLDSCHMIDT, DARWIN'S DREAMPOND: DRAMA IN LAKE VICTORIA (Sherry Marx-MacDonald trans., 1998).

[580] T.S. ELIOT, *Little Gidding*, *ll.* 239–42, *in* FOUR QUARTETS 49, 59 (1943).

in the melting pot that the freely interbreeding world has become.

None of these arguments against affirmative action rests on any theory of justice or an appeal to sympathy for putatively innocent white victims. "'Deserve,'" I repeat, "don't have nothing to do with it."[581] If affirmative action is to be justified on the terms outlined in *Bakke*, then it is diversity rather than justice that must supply the defense. And the failure of that defense, "when viewed by the light of our knowledge of the [various] world[s]" in which diversity matters, "is unmistakable."[582] "It is incredible that all these facts should speak falsely."[583] All of our justice-seeking urges notwithstanding, we must confess that affirmative action has been judged on its own terms—and has been found wanting. Diversity as an affirmative action rationale, simply put, has failed.

A. *Stealth Kakocracy*

Let us begin by paying proper homage to Lyndon Johnson who, with a later boost from Richard Nixon,[584] introduced affirmative action into American law.[585] President Johnson's footrace metaphor is one of the most widely quoted presidential defenses of affirmative action. Johnson stressed the remedial imperative of affirmative action: "You do not take a person who for years has been hobbled by chains and liberate him, bring him to the starting line of a race, and then say, 'You are free to compete with all the others,' and still justly believe that you have been completely fair."[586]

It strains credulity, however, to take as masterful a politician as Lyndon Johnson at face value. As a beneficiary of one of the deepest "good ol' boy" networks of all time, Johnson surely expected that affirmative action would create a new class of bureaucrats and other insiders, who would proceed to duplicate themselves through race-conscious hiring. This is an intensely Darwinian vision of affirmative action as a political surrogate for natural

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581 UNFORGIVEN (Warner Bros. 1993), *quoted in* Chen, *supra* note 10, at 1850.

582 CHARLES DARWIN, THE DESCENT OF MAN AND SELECTION IN RELATION TO SEX 630 (2d ed. 1874).

583 *Id.*

584 *See* Contractors Ass'n v. Secretary of Labor, 442 F.2d 159, 171 (3d Cir. 1971); Farber, *supra* note 25, at 896–97.

585 *See generally* HUGH D. GRAHAM, THE CIVIL RIGHTS ERA: ORIGINS AND DEVELOPMENT OF NATIONAL POLICY 1960–1972, at 284–97 (1990); Robert P. Schuwerk, Comment, *The Philadelphia Plan: A Study in the Dynamics of Executive Power*, 39 U. CHI. L. REV. 723 (1972).

586 Lyndon Johnson, Commencement Address at Howard University: To Fulfill These Rights (June 4, 1965), *reprinted in* 2 PUB. PAPERS 636 (1965).

reproduction. If the urge to commit genocide follows racial or ethnic lines,[587] we should expect other forms of politically motivated behavior, including patronage, to proceed no differently.

But the picture of Johnson that is probably most appropriate to affirmative action is that of the President predicting that "the Negroes" empowered by the Voting Rights Act of 1965 would "have every politician, north and south, east and west, kissing their ass, begging for their support."[588] As Nixon did after him, Johnson rightly recognized the awesome political power of race-conscious laws. Johnson's cynical manipulation of race brings us back to the familiar tension between the dreamer and the schemer.[589] Affirmative action as a cure for societal discrimination appeals to the dreamer, but the schemers have transformed affirmative action in practice into a corrupt jobs program. *Bakke* killed the dream but supplied diversity as a smokescreen for the scheme.[590]

In practice, the educational diversity that Justice Powell envisioned in *Bakke* has never emerged. Colleges do not keep running tallies of musicians who apply, secure admission, matriculate, and graduate. Graduate schools do not engage in elaborate schemes for "norming" the standardized test scores and undergraduate grade point averages of polyglots or committed community activists.[591] These practices are reserved for special admissions categories on which disproportionate amounts of political influence and alumni largess depend: profit-generating athletes, in-state applicants to public institutions, and "legacy" admits everywhere. Call race-based affirmative action a moral imperative if you wish, but mediocre double legacies and semiliterate gladiators make sorry company. Far from serving as an indicator of "beneficial educational pluralism,"[592] race has become the vector for yet another form of graft.

Genuine diversity in higher education should be nothing of this sort. It transcends the mere counting of bodies and beans. Each student offers more than his or her race to the university community, and the university's notion of diversity must embrace more than race.[593] Unlike its ecological counterpart,

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587 *See generally* DIAMOND, *supra* note 326, at 276–309.

588 MERLE MILLER, LYNDON: AN ORAL BIOGRAPHY 371 (1980).

589 *See* Chen, *supra* note 21, at 1266.

590 *See generally* Kingley R. Browne, *Affirmative Action: Policy-Making by Deception*, 22 OHIO N.U. L. REV. 1291 (1996).

591 *Cf.* Lino A. Graglia, *Race Norming in Law School Admissions*, 42 J. LEGAL EDUC. 97, 100 (1992) (arguing that "all or nearly all accredited law schools today[ ] use[ ] a system of race norming" in admissions).

592 Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 317 (1978) (opinion of Powell, J.).

593 *See* Amar & Katyal, *supra* note 3, at 1772; Chen, *supra* note 10, at 1878.

diversity as a justification for race-conscious official action must serve some utilitarian function. On this point, both sides in *Metro Broadcasting* agreed. Said the District of Columbia Circuit in its futile rebuff of race-conscious licensing, "[t]he goal of racial diversity might be compelling . . . only when that greater diversity serves one of society's fundamental goals."[594] Even while reversing, the Supreme Court agreed: diversity must have some discernible impact on the *content* of speech, arguably even on the *viewpoint*.[595] Diversity divorced from a measurable impact on speech converts affirmative action into a program for allocating jobs by race, perhaps the oldest and justifiably most despised of American employment practices. "Affirmative action assumes nothing about culture—neither that it has been neglected nor that it should be recognized and celebrated. It is about jobs and admissions."[596] It is "nothing more than a form of patronage."[597]

Educational race-consciousness thus pursues the connection between race and politics to its logical conclusion, eliminating intellectual diversity in the process. Each discrete and insular group represented in an affirmative action plan constitutes its own party. Expressing views shared by a salient majority of such a group is analogous to identifying with a political party. At an extreme, diversity-based affirmative action might require a professor to "obtain requisite support" from the appropriate group or to "affiliate with" that group in order to be hired, to be promoted, or to avoid being fired.[598] This is too steep a price; "the knowledge that one must have a sponsor" in the relevant [group] in order to gain or "retain one's job" represents a significant "coercion of belief."[599] Partisan or educational, patronage violates the First Amendment. To invoke the exception for political appointees with policymaking responsibilities[600] will not do, for that maneuver would subject the otherwise apolitical world of academia

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[594] Shurberg Broad. of Hartford, Inc. v. FCC, 876 F.2d 902, 913 (D.C. Cir. 1989), *rev'd sub nom.* Metro Broad., Inc. v. FCC, 497 U.S. 547 (1990).

[595] *See Metro Broad., Inc.*, 497 U.S. at 569–71.

[596] GLAZER, *supra* note 433, at 12.

[597] City of Richmond v. J.A. Croson Co., 488 U.S. 469, 516 n.9 (1989). *See generally* Chen, *supra* note 10, at 1896–98 (describing and condemning educational affirmative action as a form of patronage).

[598] Elrod v. Burns, 427 U.S. 347, 351, 373 (1976) (plurality opinion); *accord* O'Hare Truck Serv., Inc. v. City of Northlake, 518 U.S. 712, 171–19 (1996); Rutan v. Republican Party, 497 U.S. 62, 69 (1990); *see also* Chen, *Unloving*, *supra* note 35, at 147–49 (providing anecdotal evidence of one such incident).

[599] Branti v. Finkel, 445 U.S. 507, 516 (1980).

[600] *See id.* at 518; *Elrod*, 427 U.S. at 367 (plurality opinion); *id.* at 375 (Stewart, J., concurring in the judgment).

to an unacceptable ideological litmus test.[601]

To be sure, some snippets from *United States Reports* do support a defense of affirmative action as a patronage-like system for building minority solidarity. Justice Scalia's dissent in *Rutan v. Republican Party*[602] offers the most stirring boost. Like all other forms of patronage, affirmative action enables historically "excluded groups" to attain substantial "social and political integration" by "supporting and ultimately dominating a particular party 'machine.'"[603] According to Justice Scalia, patronage does not decimate expressive freedom; it merely channels the "diversity of political expression . . . to a different stage—to the contests for [initial] endorsement rather than the [decisive] elections."[604]

In First Amendment terms, however, patronage is patronage. "[R]acial patronage, like a racial gerrymander, is no more defensible than political patronage or a political gerrymander."[605] "To the victor," after all, "belong only those spoils that are constitutionally obtained."[606] Affirmative action in practice creates corrupt jobs programs and celebrity admissions programs without advancing any identifiable, much less substantial, interest in diversity. Indeed, to the extent "rewarding race consciousness . . . encourage[s] more race consciousness" distributing "valuable preferences" by race may actually lessen diversity by redirecting minority students' and teachers' viewpoints toward a homogenous culture of victimhood.[607] When an affirmative action program restricts itself to "six racial classifications, and no others,"[608] and when the University of Texas tellingly confines preferential treatment to politically potent black and Chicano constituencies,[609] the program is embarrassingly less interested in true expressive diversity than in the "allocation of goods to persons of particular racial backgrounds."[610]

How indeed does one pick which groups to favor? Diversity cannot be

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[601] *See* AMERICAN ASS'N OF UNIV. PROFESSORS, ACADEMIC FREEDOM AND TENURE 167 (1967) ("An inviolable refuge from such [political] tyranny should be found in the university."), *reprinted in* HAMILTON, *supra* note 431, at 365.

[602] 497 U.S. 62 (1990).

[603] *Id.* at 108 (Scalia, J., dissenting).

[604] *Id.* at 109.

[605] City of Richmond v. J.A. Croson Co., 488 U.S. 469, 516 n.9 (1989).

[606] *Rutan*, 497 U.S. at 64.

[607] Bloom, *supra* note 84, at 52.

[608] Fullilove v. Klutznick, 448 U.S. 448, 552 n.30 (1980) (Stevens, J., dissenting).

[609] *See* Hopwood v. Texas, 78 F.3d 932, 966 n.24 (5th Cir.) (Wiener, J., specially concurring), *cert. denied*, 518 U.S. 1033 (1996).

[610] Metro Broad., Inc. v. FCC, 497 U.S. 547, 623 (1990) (O'Connor, J., dissenting); *accord* Chen, *supra* note 10, at 1892–93.

limited to one race or another. It is no answer to assert that "a university should exclude from its affirmative action program . . . those applicants whose race is adequately represented without affirmative action."[611] Just as every species is intrinsically valuable, no race is "less" diverse than any other. No employer, government, or greater force can explain, for instance, "[w]hy a black coach [can be] deemed capable of providing the benefits associated with racial diversity that a hispanic coach could not."[612] Therein lies a trap that has ensnared much of the educational establishment. Affirmative action "is fraught with . . . dangers, for one must immediately determine which groups are to receive such favored treatment and which are to be excluded, the proportions of the class that are to be allocated to each, and even the criteria by which to determine whether an individual is a member of a favored group."[613] This is why there cannot be a pick-and-choose approach to diversity.[614]

Who indeed remembers the Armenians? Seriously, why do people of Middle Eastern origin benefit so rarely from affirmative action? Arabs and Jews are protected under Title VII.[615] Both groups have endured immense amounts of ethnic hatred in the United States. The world of Islam represents one of three major civilizations now combatting each other for world domination.[616] How could any system of affirmative action ignore immigrants from the Middle East? It can if it is a jobs program rather than a serious effort to protect cultural diversity, for academic administrators and other politicians can afford to ignore groups too small or too disorganized to affect elections.

B. *Charity Toward Some, Malice Toward All*

It is no exaggeration to describe competition as *the* American cultural characteristic.[617] If so, educational affirmative action is un-American. Any practice that delivers so constantly corrosive an attack on merit-based competition deserves to be condemned as a seditious institution. Americans as a rule give no respect to boondoggles won through political blackmail rather than

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611 Note, *supra* note 75, at 1363.

612 Covington v. Beaumont Indep. Sch. Dist., 714 F. Supp. 1402, 1412–13 (E.D. Tex. 1989).

613 DeFunis v. Odegaard, 416 U.S. 312, 338 (1974) (Douglas, J., dissenting).

614 *See* Hopwood v. Texas, 78 F.3d 932, 966 (5th Cir.) (Wiener, J., specially concurring), *cert. denied*, 518 U.S. 1033 (1996).

615 *See* Saint Francis College v. Al-Khazraji, 481 U.S. 604, 606 (1987) (Arabs); Shaare Tefila Congregation v. Cobb, 481 U.S. 615, 618 (1987) (Jews).

616 *See* HUNTINGTON, *supra* note 250, at 209–18.

617 *Cf., e.g.*, JOHN UPDIKE, IN THE BEAUTY OF THE LILIES 139 (1996) ("He didn't want to compete, and yet this seemed the only way to be an American. Be stretched or strike.").

some form of arguably merit-based competition. The longer affirmative action remains entrenched, the more blatantly political it becomes.[618]

In many circumstances, the gap between regularly and "specially" admitted students is "so highly irregular" that these admissions decisions "cannot be understood as anything other than an effort to [admit students] on the basis of race."[619] In university administration, as in redistricting, "appearances do matter."[620] Standing alone, the "dramatically irregular . . . may have sufficient probative force to call for an explanation."[621] Even sympathetic observers of affirmative action display "obvious discomfort . . . in confronting the credentials gap" between specially and regularly admitted students.[622] Visibly underprepared "special admits" bear a stigma inflicted not only by a putatively hostile majority-white society, but also by the well-intentioned university administration.[623] Nothing undermines the "democratic benefits of diversity" more thoroughly than "reinforcing stereotypes of minority students as poor students."[624] In affirmative action, race isn't the most important thing. It's the only thing.[625]

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618 *See* David A. Strauss, *Affirmative Action and the Public Interest*, 1995 SUP. CT. REV. 1, 24–25; *cf.* THOMAS SOWELL, PREFERENTIAL POLICIES 88–89 (1990) (observing how race-conscious policies have tended to become permanently entrenched despite nominal commitments to making such policies temporary).

619 Shaw v. Reno, 509 U.S. 630, 646–47 (1993) (discussing reapportionment plans and racial gerrymandering).

620 *Id.* at 647.

621 Karcher v. Daggett, 462 U.S. 725, 755 (1983).

622 Issacharoff, *supra* note 546, at 536. *See generally* ANDREW HACKER, TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL 134–46 (1992) (describing the implementation of affirmative action through changes in university admissions).

623 *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 241 (1995) (Thomas, J., concurring in part and concurring in the judgment); City of Richmond v. J.A. Croson Co., 448 U.S. 469, 516–17 (1989) (Stevens, J., concurring in part and concurring in the judgment); Fullilove v. Klutznick, 448 U.S. 448, 545, 552–54 (1980) (Stevens, J., dissenting).

624 Amar & Katyal, *supra* note 3, at 1777; *see also* Lino A. Graglia, Hopwood v. Texas*: Racial Preferences in Higher Education Upheld and Endorsed*, 45 J. LEGAL EDUC. 79, 82–83, 92–93 (1995).

625 *See* Richard P. Boley, *Lawyer Mentoring Committee*, 33 LAND & WATER L. REV. 818, 820 (1998) (quoting Vince Lombardi: "Winning isn't everything, it's the only thing"); *see also* Stephan Thernstrom, *Diversity and Meritocracy in Legal Education: A Critical Evaluation of Linda F. Wightman's "The Threat to Diversity in Legal Education,"* 15 CONST. COMMENTARY 11, 20 (1998) (reporting evidence that suggested that "[r]ace was not just one of many possible 'plus' factors" in law school admission decisions but rather "the *only* factor that could explain the admission of most black students"); *cf.* Amar & Katyal, *supra* note 3,

No less than school desegregation before *Brown v. Board of Education*[626] defamed black schoolchildren by labeling them "unfit to attend school with white children,"[627] affirmative action after *Bakke* defames all students who fall into the "preferred" categories. Both practices are engines of group defamation and group libel.[628] Justice Powell himself acknowledged that "preferential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection."[629] Over time, the stigma deepens. "[P]ervasive affirmative action for blacks"—coupled with continued but patently implausible insistence that specially admitted students are as qualified as all others[630]—has "ensure[d] that blacks are systematically" admitted to schools at "the level just above their competence and cause[d] affirmative action to become an engine of group defamation."[631] This is the sense in which even putatively benign race consciousness measures violate the "anti-subordination" principle that supposedly motivates affirmative action.[632]

Affirmative action as practiced perpetuates stereotypes of nonwhite inferiority and gives the most bigoted, least deserving whites superficially plausible but utterly illegitimate basis for attributing their success to "merit."[633] Even as smug whites regard their admission "as a matter of right," many a minority student wonders whether she was admitted "as an ornament, a curiosity, one who brings an element of the piquant to the lives of white professors and students."[634] Affirmative action's putative beneficiaries may

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at 1777 (arguing that such dispositive reliance on race is unfaithful to *Bakke*'s vision of diversity); Bloom, *supra* note 84, at 47.

626 347 U.S. 483 (1954).

627 Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 463.

628 *See generally* Beauharnais v. Illinois, 343 U.S. 250 (1952).

629 Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 298 (1978) (opinion of Powell, J.); *see also* DeFunis v. Odegaard, 416 U.S. 312, 343 (1974) (Douglas, J., dissenting).

630 *See, e.g.*, Delgado, *supra* note 82, at 1172 (arguing that students admitted and "workers hired under affirmative action . . . perform as well as anyone else, or better"); Linda F. Wightman, *The Threat to Diversity in Legal Education: An Empirical Analysis of the Consequences of Abandoning Race as a Factor in Law School Admissions Decisions*, 72 N.Y.U. L. REV. 1, 36-37 (1997).

631 Edmund Kitch, *The Return of Color Consciousness to the Constitution:* Weber, Dayton, *and* Columbus, 1979 SUP. CT. REV. 1, 12.

632 *See Bakke*, 438 U.S. at 387-88 (Marshall, J., concurring in part and dissenting in part).

633 *See* Richard Delgado, *Rodrigo's Tenth Chronicle: Merit and Affirmative Action*, 83 GEO. L.J. 1711, 1746 (1995).

634 Richard Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights*

internalize the message of inherent inferiority and thereby inflict lasting damage to their self-esteem.[635]

The heaviest burden falls upon exceptional nonwhite students. Even if their credentials and achievements match or exceed those of top white students, these students cannot completely escape the label of inferiority that affirmative action slaps on entire groups. Their superior performances are known only to those who are willing to read résumés, study transcripts, and check references. Racial identity serves as a cheaper—albeit misleading—signal of academic performance. And if one of these students should have the misfortune to hold quirky political opinions, the logic of race as a proxy all but invites his or her classmates to visit ostracization and abuse upon the misguided soul.[636] How sad that we should so casually sacrifice the constitutional aspiration, most recently expressed in *United States v. Virginia*,[637] that equal protection be measured by the needs and dreams of the most exceptional members of any group.[638]

Perversely enough, the twisted way in which affirmative action has become a mockery of itself may speed its demise. Abraham Lincoln assured us that "you can't fool all of the people all of the time."[639] When precisely does Honest Abe's maxim take effect? When, I submit, people begin to laugh at you. We are now treated to the spectacle of law students choosing electives with "many blacks and Hispanics" who would be more "likely to get the lower grades" under the school's "forced curve."[640] Lie if you must, for the implicit logic of affirmative action compels it,[641] but expect by and by to become the nation's laughingstock. When "the racial sorting" becomes so "egregious" that it no longer "takes work to get the true picture," the race-conscious stratagem

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Literature, 132 U. PA. L. REV. 561, 570 n.46 (1984).

[635] *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 241 (1995) (Thomas, J., concurring in part and concurring in the judgment); SHELBY STEELE, THE CONTENT OF OUR CHARACTER 90 (1990) ("Since there are laws to protect us against discrimination, preferences only impute a certain helplessness to blacks that diminishes our self-esteem.").

[636] *See generally* Chen, *supra* note 10, at 1900–10.

[637] 518 U.S. 515 (1996).

[638] *See id.* at 516.

[639] BARTLETT'S FAMILIAR QUOTATIONS 524 (15th ed. 1980) (quoting a speech by Lincoln in Clinton, Illinois, on September 2, 1858).

[640] Volokh, *supra* note 26, at 2067 n.16.

[641] *See* Greve, *supra* note 246, at 19–20; Christopher T. Wonnell, *Circumventing Racism: Confronting the Problem of the Affirmative Action Ideology*, 1989 BYU L. REV. 95, 119–41 (suggesting that many beneficiaries and advocates of affirmative action eventually reconcile the tension between their self-esteem and the stigma of racial preferences by attacking the notion of academic merit).

turns into "a joke."[642] History may repeat itself, but imperfectly. The first time it is tragedy; the second, farce.[643] "The first coming of the diversity rationale" in *Bakke* "depicted the tragedy of lingering racial discrimination; its second shall expose the farce that racial classifications under law have become."[644]

C. *The Coarser Angels of Our Nature*

Regardless of its effectiveness, affirmative action deserves condemnation as an institution that has systematically eroded civic virtue and republican ideals. It has bred resentment and incivility everywhere. So much for the Confucian values of "[c]ourtesy, tolerance, good faith, diligence and kindness" practiced "everywhere under Heaven."[645]

Now, to be sure, it almost goes without saying that anyone who "seriously believes in the value of education" is "an unhappy person."[646] But economic globalization has raised the stakes. Higher education may rank highest among "the few remaining magic gates to bourgeois comfort in an increasingly competitive global economy."[647] This helps make the educational affirmative action debate even more bitter than it has to be. For education to confer prestige, it must be scarce. And scarcity means winners and losers. Alas, "[n]othing burns one up faster than the affects of resentiment."[648]

Resentment breeds separatism. Many of affirmative action's strongest supporters display not the slightest interest in integration or interaction across racial lines.[649] As it was with Satan in *Paradise Lost*, so it is with the bitterest children of affirmative action: "fardest from him is best, / Whom reason hath equall'd, force hath made supreme / Above his equals."[650] Well, maybe not quite. Satan was never so inarticulate that he would have stooped to chanting,

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642 Abigail Thernstrom, *Voting Rights: Another Affirmative Action Mess*, 43 UCLA L. REV. 2031, 2041 (1996).

643 *See* KARL MARX, THE EIGHTEENTH BRUMAIRE OF LOUIS NAPOLEON 9 (Daniel de Leon trans., 1919) ("Hegel says somewhere that all great historic facts and personages recur twice. He forgot to add: 'Once as tragedy, and again as farce.'").

644 Chen, *supra* note 21, at 1130.

645 CONFUCIUS, THE ANALECTS ¶ 17.5, at 69–70 (Raymond Dawson trans., 1993).

646 BILL WATTERSON, THE CALVIN AND HOBBES TENTH ANNIVERSARY BOOK 25 (1995).

647 Chen, *supra* note 21, at 1134.

648 FRIEDRICH NIETZSCHE, ECCE HOMO, *in* ON THE GENEOLOGY OF MORALS AND ECCE HOMO 215, 230 (Walter Kaufman ed. & trans., 1967) (1888).

649 *Cf.* Amar & Katyal, *supra* note 3, at 1778 (suggesting "that schools that permit de facto residential segregation may be estopped from pleading *Bakke* as a defense to affirmative action in admissions").

650 MILTON, *supra* note 505, at book I, *ll.* 247–49.

"Hey, hey, ho, ho, Western culture's gotta go."[651]

How bedeviling the whole circus has become! The rancor that affirmative action fosters has inspired rude, dishonest behavior. Players on both sides of the issue evidently know no ethical bounds in their zealous desire to extend or to end affirmative action. For every Timothy Maguire who purloins data from the Georgetown Law Center admissions office,[652] there is a dishonest law clerk who leaks drafts of a controversial judicial opinion on affirmative action.[653]

Tragically, the academy seems unable to end the cycle of mendacity and resentment on its own. "[T]imeless in [its] ability to affect the future," the diversity rationale has become affirmative action's dead hand.[654] Grounding affirmative action in diversity frees universities from having "to answer the hardest question" of all: "the question of when it is time to stop."[655] The academic committees charged with enforcing and preserving affirmative action are "utterly unrepresentative of anything" or anyone.[656] In the "secret and specialized contexts" of university hiring and admissions, "in an atmosphere uninhibited by the usual challenges of representative government," affirmative action as patronage enjoys perpetual life.[657] "The harvest is past, the summer is ended, and we are not saved."[658]

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651 *Western Culture: The Decade's Great Debate Continues . . .*, STAN. OBSERVER, Feb. 1998, at 1, *quoted in* Arthur Austin, *The Top Ten Politically Correct Law Reviews*, 1994 UTAH L. REV. 1319, 1334; *cf.* James D. Gordon III, *Oh No! A New Bluebook!*, 90 MICH. L. REV. 1698, 1704 (1992) ("Hey hey, ho ho Bluebook culture's got to go.").

652 *See* Anthony T. Pierre et al., *Degrees of Success*, WASH. POST, May 9, 1991, at A31.

653 *See* Lamprecht v. FCC, 958 F.2d 382, 402–03 (D.C. Cir. 1992) (Buckley, J., concurring).

654 Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 276 (1986) (plurality opinion of Powell, J.).

655 Malamud, *supra* note 527, at 953.

656 Guido Calabresi, Bakke *as Pseudo-Tragedy*, 28 CATH. U. L. REV. 427, 431–32 (1979); *see also* Chin, *supra* note 112, at 934–35.

657 Board of County Comm'rs v. Umbehr, 518 U.S. 668, 683 (1996) (internal quotation marks omitted); *see also* Thomas J. Kane, *Racial and Ethnic Preferences in College Admissions*, *in* THE BLACK-WHITE TEST SCORE GAP 431, 432 (Christopher Jencks & Meredith Phillips eds., 1998), *reprinted in* 59 OHIO ST. L.J. 971, 971 (1998) ("Because colleges shroud their admissions procedures in mystery, the public knows little about the extent to which racial preference is practiced. Even less is known about the impact of such preferences on the later careers of [affected students]."); *cf.* Diane Ravitch, *Adventures in Wonderland: A Scholar in Washington*, 64 AM. SCHOLAR 497, 498 (1995) ("There is one sure way to achieve eternal life: Become a federal program.").

658 *Jeremiah* 8:20; *cf.* DERRICK BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE (1987).

D. *Color-Blindness of a Different Sort*

America's obsession with race has blinded its universities to other measures of diversity. Other factors, rarely if ever considered in university admissions or faculty hiring, outweigh race in their impact on intellectual, aesthetic, and political viewpoints. Consider birth order, for example. "As a source of militant tendencies in racial reform, birth order is *twice* as predictive as gender or race."[659] Indeed, whereas birth order is a "significant predictor of militancy," neither race nor gender is.[660] Despite its impact on personality and viewpoint, birth order shows up nowhere in hiring or university admissions timetables.

Foreign language ability is another forgotten factor. Although failure to accommodate linguistic difference has been recognized as a civil rights violation for nearly a quarter-century,[661] the literature on educational affirmative action scarcely mentions this form of diversity. The oversight is all the more surprising in light of the growing evidence that human genetics more closely tracks language groups than any of the traditional measures of race.[662] To my knowledge, no program for affirmative action in university admissions explicitly gives preferential treatment to applicants who speak some language besides English, either as a first or second language. Universities seem to be deliberately ignoring the obvious overlap with membership in the Hispanic and Asian-American categories. Membership in a favored racial group provides conclusive evidence of cultural diversity. If anything, any effort to define Asian identity through language may meet resistance from those who recognize just how incoherent and fragile the Asian-American coalition really is.[663]

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[659] FRANK J. SULLOWAY, BORN TO REBEL: BIRTH ORDER, FAMILY DYNAMICS, AND CREATIVE LIVES 300 (1996).

[660] *Id.* at 524 (emphasis omitted).

[661] *See* Lau v. Nichols, 414 U.S. 563, 568–69 (1974) (holding that the failure to provide adequate instruction to Chinese-speaking schoolchildren violated Title VI of the Civil Rights Act of 1964); *cf.* Hernandez v. New York, 500 U.S. 352, 354 (1991) ("[F]or certain ethnic groups and in some communities, that proficiency in a particular language, like skin color, should be treated as a surrogate for race under an equal protection analysis.").

[662] *See, e.g.*, Luigi Luca Cavalli-Sforza, *Genes, Peoples and Languages*, SCI. AM., Nov. 1991, at 104; Luigi Luca Cavalli-Sforza et al., *Reconstruction of Human Evolution: Bringing Together Genetic, Archaeological, and Linguistic Data*, 85 PROC. NAT'L ACAD. SCI. 6002 (1988). "One interesting" implication of this research "is that what most people think of as the Mongoloid or Oriental race on the basis of superficial facial features and skin coloring may have no biological reality." PINKER, *supra* note 330, at 257. In humanity's linguistically informed "genetic family tree, northeast Asians such as Siberians, Japanese, and Koreans are more similar to Europeans than to southeast Asians such as Chinese and Thai." *Id.*

[663] *Compare* Chen, *Unloving*, *supra* note 35, at 157 (recounting how I responded to an

Perhaps all this simply goes to show that affirmative action is nothing more than the last of many legal reactions to the great black migration, by far the most important demographic change in America before 1965.[664] In other words, affirmative action is a reaction to the great demographic upheaval of the last generation. The *real* demographic change of the last third of the century has been immigration and the dramatic explosion in foreign-born members of the U.S. population. Immigration and different rates of reproduction suggest that Hispanics of all races will outnumber non-Hispanic blacks in this country by 2005.[665] The 2000 Census, in other words, will be the last one in which the black population will be the largest minority bloc in America. We are rapidly moving beyond affirmative action's original black/white paradigm, a paradigm too rigid to respond to sweeping demographic revolution.

E. *A Dirge That Is Murmured Around the Lowly Grave*[666]

Of its own accord, mere insignificance would be forgivable. Affirmative action might waste law professors' time, but society is arguably better off for that. But in light of far more pressing social priorities and, yes, the power of legal academics to alleviate these tragedies, the obsession with affirmative action and its false vision of diversity deserves harsh censure. In a word, diversity *hurts* because it *diverts*.

1. *The Wages of Crying Wolf*

Extinction is forever. Affirmative action should not be. Short of forcible judicial intervention, however, no such end looms. "Affirmative action today, affirmative action tomorrow, affirmative action forever." Such is the battle cry in today's schoolhouse door.

Overblown rhetoric aside, the stakes in the affirmative action debate are

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uncomfortable inquiry into Asian-American political identity by converting the "English-language interrogation into a Taiwanese-language dialogue") *with* Gotanda, *supra* note 155, at 1601 (criticizing my retreat into "Taiwanese ethnicity" at the expense of a larger Asian-American racial identity and my effort "to shut out non-Taiwanese through the exclusivity of a 'foreign' language").

664 *See generally* NICHOLAS LEMANN, THE PROMISED LAND: THE GREAT BLACK MIGRATION AND HOW IT CHANGED AMERICA (1991).

665 *See* Steven A. Holmes, *Black Populace Nearly Equaled by Hispanic*, N.Y. TIMES, Aug. 7, 1998, at A13.

666 NANCI GRIFFITH, *Hard Times Come Again No More*, *on* OTHER VOICES, TOO (A TRIP BACK TO BOUNTIFUL) (Electra 1998) (performing a version of this Stephen Foster classic).

relatively trivial.[667] The loss of racial diversity in higher education is blamed on excessive reliance on standardized tests and other supposedly "quantitative" measures of preparedness. But if test scores and grade point averages are admissions office tools of convenience used to weed out weaker applicants of all races, colors, and creeds, "either the [standardized test] says something meaningful about all aspiring . . . students . . . , or [a] school's admissions officers had better explain why they use the test at all."[668] Questions of consistency aside, marginal shortcomings by well-intentioned educators in defining or gauging the notion of academic merit barely warrant the sort of opprobrium that should be reserved for conscious acts of overhunting and habitat destruction—or for overtly racist acts.

In other words, the entire debate over educational affirmative action turns not on access as such to higher education, but rather on marginal differences. Nearly three decades ago, before *Bakke*, even before *DeFunis*, prescient scholars argued that race-conscious admissions would merely steer some black students toward stronger schools without substantially affecting the total number of blacks in higher education.[669] As the sun threatens to set on affirmative action, we will witness little more than the reverse. This "redistribution of minority students down the educational pecking order" poses a "cognizable but hardly unbearable disturbance."[670] Only a quarter of American universities are selective enough to contemplate affirmative action; the remainder admit all or nearly all applicants and will remain bastions of access to higher education no matter what fate befalls *Bakke*.[671]

What a colossal waste this fixation has been. Our focus has been misguided all along. *Rodriguez*,[672] handed down in the same year as Congress passed the Endangered Species Act, was a far more significant setback for educational equity than any outcome in *Bakke* ever could have been. As our eyes were diverted to the 1977 Term's second—and less significant—diversity case, our eyes have likewise focused on one of the less significant educational decisions in the Supreme Court's case law.

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667 *See generally* Farber, *supra* note 25, at 912 (claiming the "decreasing significance of affirmative action").

668 Chen, *supra* note 21, at 1149.

669 *See* THOMAS SOWELL, BLACK EDUCATION: MYTHS AND TRAGEDIES (1972); Clyde W. Summers, *Preferential Admissions: An Unreal Solution to a Real Problem*, 1970 U. TOL. L. REV. 377.

670 Bloom, *supra* note 84, at 62.

671 *See* DEREK BOK & WILLIAM G. BOWEN, THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSION (1998).

672 San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973).

A dirge, then, for the forgotten victims, for the worthy causes obscured by the affirmative action debate and weakened by the resulting diversion of political energy and material resources:[673]

While we seek mirth and beauty and music light and gay
There are frail forms fainting at the door
Though their voices are silent, their pleading looks will say;
Oh, hard times come again no more.[674]

What we are seeing in undergraduate and law school admissions is a disappointment of the constitutional goal of avoiding a generation of illiterates.[675] Public schools play a supremely important role "in the preparation of individuals for participation as citizens, and in the preservation of the values on which our society rests."[676] With *Dowell*,[677] *Freeman*,[678] and the *Missouri v. Jenkins*[679] litigation, the *Brown* era has come to an end, and clinging to some variant of *Bakke* is a sorry substitute. "[I]lliteracy is a crime against humanity, for we are the only creatures who have the Word, and therefore implicit in our human condition is the right to read and write, and to create and enjoy the texts of the imagination."[680] Without the Word there can be no Culture, no Law—nothing of human value and no civilized means by which to protect it. These luxuries emerge only after human communities "become adept . . . at creating and categorizing mental representations" of wealth-building and esthetically pleasing activities.[681]

I have a modest proposal. Perhaps we can agree to end affirmative action

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673 *See generally* Suzanna Sherry, *The Forgotten Victims*, 63 U. COLO. L. REV. 375 (1992) (arguing that the overstating of the problems of racial minorities has compounded neglect of gender discrimination).

674 GRIFFITH, *supra* note 666.

675 *Cf.* Plyler v. Doe, 457 U.S. 202, 241 (1982) (Powell, J., concurring) ("[I]t hardly can be argued rationally that anyone benefits from the creation within our borders of a subclass of illiterate persons.").

676 Ambach v. Norwick, 441 U.S. 68, 76 (1979). *See generally* Suzanna Sherry, *Responsible Republicanism: Educating for Citizenship*, 62 U. CHI. L. REV. 131 (1995) (outlining the contours of an education that will produce "republican citizenship").

677 Board of Educ. v. Dowell, 498 U.S. 237 (1991).

678 Freeman v. Pitts, 503 U.S. 467 (1992).

679 515 U.S. 70 (1995); 495 U.S. 33 (1990).

680 Nadine Gordimer, *Dare to Dream of Eradicating Poverty*, N.Y. TIMES, Aug. 1, 1998, at A13.

681 Antonio R. Damasio & Hanna Damasio, *Brain and Language*, SCI. AM., Sept. 1992, at 88, 89.

now and forever in exchange for a binding national commitment to educational equity at primary and secondary levels. No price is too great. Marvel "at what every kid can do when he learns A to Z," how young appetites whetted early and often will grow to "devour every one of those books in the Tower of Knowledge."[682] Let the wailing and gnashing of teeth begin. Taxes *will* be raised and resources shifted from the rich and the bourgeois to the poor.

2. *Exit the Dragon*

I regret having called affirmative action a "bourgeois boondoggle."[683] Not that the practice itself is effective, for it is not.[684] Rather, I regret failing to deliver a harsher blow to the *attention* devoted to affirmative action. The volume of scholarship devoted to this subject is a disgrace, and I am ashamed to admit my complicity in the overkill. The energy lavished in defense of race-conscious university admissions rather than deeper questions of distributive justice is insulting and offensive. Within the admittedly limited world of legal scholarship, it is hard to imagine a more ridiculous misallocation of scarce resources than the amount of ink currently dedicated to this subject, especially when the only issue at stake is the marginal difference between a seat at an elite school and a seat at a somewhat less elite school. Achieving precise demographic balance in elite law schools is an extravagance in a society torn by abiding structural inequality attributable to factors including, but transcending, race. In a word, it is *scandalous* to treat disappointed professors and students as "the wretched of the earth" while ignoring the concerns of those "who live in the streets and beg for scraps of garbage to eat."[685]

After this diatribe, I have no choice but to renounce affirmative action scholarship. And so I do. Henceforth I shall write no article respecting the establishment of affirmative action, or addressing individuals' freedom therefrom. Having learned first-hand the perils of dissenting on matters of race, however, I must reserve the right to defend myself.[686] I can unflinchingly

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[682] 10,000 MANIACS, *Cherry Tree*, *on* IN MY TRIBE (Electra/Aslyum 1987).

[683] Chen, *supra* note 10, at 1893.

[684] *See* CARTER, *supra* note 435, at 71–72 (criticizing affirmative action as "racial justice on the cheap"); WILLIAM JULIUS WILSON, THE DECLINING SIGNIFICANCE OF RACE 110 (1978) (criticizing the attention directed to affirmative action as a relatively elite concern); WILLIAM JULIUS WILSON, THE TRULY DISADVANTAGED 115–16 (1987) (finding that affirmative action has primarily benefited members of the middle class rather than the underclass).

[685] Graber, *supra* note 161, at 818.

[686] *See* Chen, *Unloving*, *supra* note 35, at 145; Chen, *Untenured but Unrepentant*, *supra* note 35, at 1612.

promise that anything I write on affirmative action will be narrowly tailored toward accomplishing a compelling scholarly objective. We scholars should withstand the same sort of strict scrutiny that affirmative action itself must endure after *Adarand*.[687] Short of meeting this lofty standard, we should confine ourselves to writing articles on things that really matter, like the price of milk.[688]

F. *The Destiny of Species*

I quit this field with no regrets. Eventually the affirmative action problem will go away on its own. Indeed, we may actually live long enough to witness the withering away of the racialist state. In the long run we are all multiracial.

No respectable scientist today defines race in biological terms or defends anyone who does. Genetic variability within any putative race—that is, differences between members of that race—overwhelms any differences between the races as such.[689] Thanks to the interbreeding that unites *Homo sapiens* as a species, "the phenotypical characteristics we traditionally associate with particular 'races' are not quanta of racial identity but infinitely modulated characteristics which further shade into each other with each successive [reproductive] union."[690] Yet the multiculturalist movement effectively assumes that "something in [students'] blood or their race memory or in their cultural

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[687] Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995).

[688] *Compare* Chen, *supra* note 273, at 860–62 (describing lower food prices as a policy imperative consistent with widely shared notions of distributive justice) *with* West Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 201 n.18 (1994) (observing that 2¢ per quart in income support for dairy farmers was unlikely to stir consumer opposition) *and* Scott Kilman, *Why the Price of Milk Depends on the Distance from Eau Claire*, WALL ST. J., May 20, 1991, at A1 ("Milk is sort of like the international gold system . . . . Only a handful of people claim to understand it, and most of them are lying."). *See generally* Jim Chen, *The Potable Constitution*, 15 CONST. COMMENTARY 1 (1998) (uncovering the unsung constitutional significance of cases involving liquor, beer, wine, and milk). In other words, governmental abuse is most likely whenever "the average consumer" or the average voter "has no incentive to become informed about [a contested] program, let alone to lobby against it." Daniel A. Farber, *Positive Theory as Normative Critique*, 68 S. CAL. L. REV. 1565, 1571 (1995). This sort of red flag should be inviting massive amounts of legal scholarship. By and large, it does not. And *that* is disgraceful.

[689] *See, e.g.*, Walter F. Bodmer & Luigi Luca Cavalli-Sforza, *Intelligence and Race*, SCI. AM., Oct. 1970, at 19–29; John Tooby & Leda Cosmides, *On the Universality of Human Nature and the Uniqueness of the Individual: The Role of Genetics and Adaptation*, 58 J. PERSONALITY 17, 35 (1990).

[690] Christopher A. Ford, *Administering Identity: The Determination of "Race" in Race-Conscious Law*, 82 CAL. L. REV. 1231, 1239 (1994).

DNA defines who they are and what they may achieve."[691]

To be sure, the obsession with race will not readily fade. "Of all ties, the ties of blood are strongest."[692] Adoptive parents do and perhaps always will yearn for some visible genetic link to the children they adopt.[693] But the tide is turning against race, and irretrievably so. Exogamy is booming.[694] It is the rare and pessimistic naysayer who stresses how many white Americans are married to other whites.[695] Yet in 1990, almost ten million persons indicated "other" when the Census Bureau asked for their race[696]—and this despite strident official efforts to confine respondents to the five standard categories.[697] The Bureau's resistance to giving individuals "the option of refusal" or "the choice of more than one [racial] category" leaves "no doubt about the [government's] intent and effort to enforce racial classification and quotas."[698] The government has partially relented; beginning in 2000, individuals of mixed-race backgrounds will be allowed to check more than one box even though they will be barred from describing themselves as "multiracial."[699] We have not witnessed the end of racism or even of racial classifications, but we may be witnessing the beginning of the end. Race-conscious programs can last only as long as their underlying racial categories endure. The coming wave of racial confusion spells welcome doom for race in American public life.[700]

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691 Diane Ravitch, *Multiculturalism: E Pluribus Plures*, 59 AM. SCHOLAR 337, 341 (1990).

692 BERTOLT BRECHT, THE CAUCASIAN CHALK CIRCLE, *in* SEVEN PLAYS 495, 578 (Eric Bentley ed., 1961).

693 *See* Dorothy E. Roberts, *The Genetic Tie*, 62 U. CHI. L. REV. 209 (1995).

694 *See* Susan Welch & John Gruhl, *Does* Bakke *Matter? Affirmative Action and Minority Enrollments in Medical and Law Schools*, 59 OHIO ST. L.J. 697, 728 n.159 (1998).

695 *See* Robert S. Chang, *Reverse Racism!: Affirmative Action, the Family, and the Dream That is America*, 23 HASTINGS CONST. L.Q. 1115, 1124 (1996).

696 *See* Kenneth Payson, Comment, *Check One Box: Reconsidering Directive No. 15 and the Classification of Mixed-Race People*, 84 CAL. L. REV. 1233, 1261 (1996).

697 *See* Directive No. 15, Race and Ethnic Standards for Federal Statistics & Administrative Reporting, 43 Fed. Reg. 19,260 (1978).

698 Ho v. San Francisco Unified Sch. Dist., 147 F.3d 854 (9th Cir. 1998).

699 *See* Office of Management and Budget, Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity, 62 Fed. Reg. 58,782, 58,786 (Oct. 30, 1997); *see also* Christine B. Hickman, *The Devil and the One Drop Rule: Racial Categories, African Americans, and the U.S. Census*, 95 MICH. L. REV. 1161, 1187–1202 (1997) (reviewing proposals to add a multiracial category to the Census).

700 *Cf.* Payson, *supra* note 696, at 1288 (rejecting the notion of official colorblindness but admitting that the intractable nature of tracking multiracial individuals may lead in that direction).

VII. THE TWILIGHT OF THE IDOLS

I spun, I wove, I kept the house, I nursed the sick,
I made the garden, and for holiday
Rambled over the fields where sang the larks,
And by Spoon River gathering many a shell,
And many a flower and medicinal weed—
Shouting to the wooded hills, singing to the green valleys. . . .
What is this I hear of sorrow and weariness,
Anger, discontent and drooping hopes?
Degenerate sons and daughters,
Life is too strong for you—
It takes life to love Life. —Edgar Lee Masters[701]

What should a legal scholar say upon exiting any field, especially one as intractable as this? Be honest. Get real. Be bold.

Be honest. Honesty really does remain the best policy. As matters stand, honesty in discussions of affirmative action is in short supply. Affirmative action has "always depended on secrecy and deceit"[702]—on the ignorance of strangers, so to speak.[703] To keep swallowing *Bakke* without examining its central rationale condemns us all to suffer "the profound moral perversity of a world" where "everything is pardoned in advance and therefore everything cynically permitted."[704] *Bakke* simply does not emerge unscathed from a critical comparison with cognate forms of diversity. The same defects that doomed the role model theory of affirmative action—"lack of substantiation and a well-nigh unlimited reach"—should doom the diversity-based variant as well.[705] The role model rationale is "a very big lie: a whopper."[706] So is the diversity rationale. Oh, the mendacity![707]

If affirmative action is to survive, its defenders must be more honest. "[S]eparat[ing] the concept of diversity from affirmative action" would make a

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[701] EDGAR LEE MASTERS, *Lucinda Matlock, in* SPOON RIVER ANTHOLOGY 295, 295 (John E. Hallwas ed., Univ. of Ill. Press 1992) (1915).

[702] Greve, *supra* note 246, at 16.

[703] *Cf.* TENNESSEE WILLIAMS, A STREETCAR NAMED DESIRE 102–03 (1947) ("I have always depended on the kindness of strangers.").

[704] KUNDERA, *supra* note 1, at 4.

[705] Wittmer v. Peters, 87 F.3d 916, 920 (7th Cir. 1996), *cert. denied*, 117 S. Ct. 949 (1997).

[706] Richard Delgado, *Affirmative Action as a Majoritarian Device: Or, Do You Really Want to Be a Role Model?*, 89 MICH. L. REV. 1222, 1228 (1991).

[707] *See* TENNESSEE WILLIAMS, CAT ON A HOT TIN ROOF 108–15 (1955).

good start.[708] "Affirmative action is neither a necessary nor sufficient condition for diversity, and the diversity" that *Bakke* envisioned "goes beyond affirmative action categories."[709] Any institution relying on *Bakke*'s diversity rationale must assure "the public that the institution [is] living within the law rather than surreptitiously evading it."[710] This means publishing extensive, brutally honest "average grade point and standardized test scores for [all] groups."[711] If the price of honesty is too dear, then racial preferences deserve to die.[712]

Get real. If affirmative action ended tomorrow, the world would not. There is no blunter way to say this.

Be bold. Polemics lose their power once their authors speak from positions of absolute security. Such is the rhetorically enervating effect of tenure.[713] Still, I beg you: "For believe me: The secret for harvesting from existence the greatest fruitfulness and the greatest enjoyment is— to *live dangerously*!"[714]

One of the hidden virtues of the California Regents' vote to terminate affirmative action, Proposition 209, and the *Hopwood* decision is that we will now experience political diversity in a sense that would have pleased Louis Brandeis. California and Texas will serve as "laboratories of democracy";[715] we shall be able to compare their experiences after affirmative action with those of states who have yet to abandon race-based admissions. We thus return to the original meaning of *E pluribus unum*,[716] to the original meaning of "diversity" in American law.[717] Unlike their counterparts in biology, specialists in educational diversity have fifty-one publicly supported proving grounds, plus an even greater variety of privately owned laboratories. This is a far cry from that lament of environmentalists everywhere, "One planet, one experiment."[718]

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[708] Welch & Gruhl, *supra* note 694, at 730.

[709] *Id.*

[710] Bloom, *supra* note 84, at 68.

[711] *Id.* at 69.

[712] *See id.* at 71.

[713] *See* Chen, *supra* note 688, at 1.

[714] FRIEDRICH NIETZSCHE, THE GAY SCIENCE 228 (Walter Kaufmann trans., 1974) (1882).

[715] New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). *See generally* Farber, *supra* note 438.

[716] *Cf.* ARTHUR M. SCHLESINGER, JR., THE DISUNITING OF AMERICA: REFLECTIONS ON A MULTICULTURAL SOCIETY 2 (1991) (decrying the "cult of ethnicity" that "belittles *unum* and glorifies *pluribus*").

[717] *Cf.* U.S. CONST. art. III, § 1 (permitting federal jurisdiction to controversies between citizens of different states); 28 U.S.C. § 1332 (1994) (exercising such diversity jurisdiction).

[718] WILSON, *supra* note 131, at 182; *cf.* Norman Myers, *Tropical Forests and Their*

Affirmative action is nothing but an experiment, "as all life is an experiment."[719] It is time to try something else. Ah, "[i]f we would guide by the light of reason, we must let our minds be bold."[720]

Species: Going, Going . . . ?, *in* BIODIVERSITY, *supra* note 133, at 32 ("[W]e are conducting an irreversible experiment on a global scale with Earth's stock of species.").

[719] Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

[720] *New State Ice Co.*, 285 U.S. at 311 (Brandeis, J., dissenting).